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88-2079

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF ILLINOIS,

Petitioner,

vs.

REGINALD MAHAFFEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ
Solicitor General, State of Illinois
TERENCE M. MADSEN
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
Attorneys for Petitioner

CECIL A. PARTEE
State's Attorney of Cook County
309 Richard J. Daley Center
Chicago, Illinois 60602
INGE FRYKLUND
RENEE GOLDFARB *
Assistant State's Atttorneys
Of Counsel

* Counsel of Record
(312) 443-5484

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTIONS PRESENTED FOR REVIEW

Whether the majority of the Illinois Supreme Court failed to follow this Court's interpretation of the Confrontation Clause by holding that *Lee v. Illinois* and *Cruz v. New York* require automatic reversal of respondent's conviction upon a finding that a non-testifying co-defendant's confession was inadmissible as substantive evidence and refusing to engage in a harmless error analysis as mandated by this Court in *Schneble v. Florida* and *Harrington v. California.*

Whether any confrontation clause error would have been considered harmless, if a harmless error analysis had been done, where respondent confessed to committing and/or intending to commit every crime charged in the indictments (except the one for which he was found not guilty), where respondent was positively identified by the only surviving victim as one of the murderers, where the physical and scientific evidence substantially corroborated respondent's confession, where respondent possessed numerous items of the victims' personal property when arrested and where the record affirmatively demonstrated that *this* jury *did* follow the court's instructions not to consider the co-defendant's confession against respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, which was entered on April 20, 1989.

OPINION BELOW

The opinion of the Supreme Court of Illinois, to be published as The People of the State of Illinois, appellee v. Jerry Mahaffey, appellant—The People of the State of Illinois, appellee v. Reginald Mahaffey, appellant, is reproduced as Appendix A to this Petition.

JURISDICTION

The opinion, order and judgment of the Supreme Court of Illinois were entered on April 20, 1989. This Petition for a Writ of Certiorari is filed within 60 days of that date. United States Supreme Court Rule 20(1). The decision of the Illinois Supreme Court was explicitly based on federal constitutional law, in particular on the confrontation clause of the sixth amendment as applied to the States through the fourteenth amendment and the decisions of this Court in *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) and *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987). Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment to the United States Constitution provides, in part, that

> "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

On August 29, 1983, in the early morning hours, Dean and Jo Ellen Pueschel were murdered in their home and their 11-year-old son, Rickey, survived the attempt to take his life. Rickey testified at trial that while sleeping that night, he found himself awakened in a headlock position. Two different voices were saying "shut up" and "be cool." He tried to scream, but a hand blocked his nose. It was difficult to breathe and he was either hit or fell back to sleep. (R. 2386-2387) Rickey awoke again, walked to the kitchen in a daze, saw his mother being held by one man, while another man walked through the back door. Rickey and his mother were forced to lie down in the dining room on their stomachs. Rickey saw his mom crying while she was being hit and then he did not remember what happened. He either fell asleep or was struck. (R. 2387, 2390, 2451) He awoke about 8:20 a.m., saw his father lying dead on the floor in his parents' bedroom, saw his mother lying dead on the floor in the dining room and walked outside in a daze. (R. 2388-2389) His grandfather drove up and Rickey said, "My mom and dad are dead." (R. 2235) Joseph Heinrich found his daughter lying in a pool of blood in the dining room and phoned police. Rickey was transported by ambulance to the hospital.

Detective Anthony Graffeo arrived at 2519 West Jerome in Chicago at about 9:30 a.m. He entered the kitchen through the back door and found a bloody bat with the name "Reggie Jackson" inscribed on it. He found Jo Ellen Pueschel in the dining room lying face down with a pool of blood under her head. Dean Pueschel was found lying on the floor in the bedroom; he had been battered about the head and there were numerous puncture wounds on

his side. Next to him was an empty gun holster. The Detective found a bloody baseball bat with "Ted Simmons" inscribed on it, a pellet gun under the bed, two empty cases for rifles and shotguns, and a box for a hand gun; a jewelry box and dresser drawers were pulled out. (R. 2258-2268)

On September 2, 1983, Sergeant Byrne and Detective Grunhard responded to a radio call to meet Sergeant Jackson who had Cedric Mahaffey seated in a squad car. Cedric told them he knew who committed the double murder on the north side of Chicago a couple of days earlier. He would not initially give the names to the officers until he could be sure of their involvement and he inquired if any guns had been stolen. After Sergeant Byrne verified that guns had been stolen, Cedric stated that he knew that they were a .357 magnum, a 12 gauge shotgun and a .30 caliber rifle. (R. 2717-2721) Cedric accompanied the officers and pointed out the apartments where the guns and the defendants could be found. Cedric reluctantly told the officers that the men who committed the double murder were his brothers, Reginald and Jerry Mahaffey. (R. 2722)

Upon Reginald Mahaffey's arrest, a partially loaded .357 magnum revolver was found on the nightstand next to where he had been lying. (R. 2539-2540) The blood on the gun was subsequently determined to be the same type as Jo Ellen Pueschel (R. 2818), and the gun was identified as having belonged to Dean Pueschel. Numerous items of jewelry and other personal property from the Pueschel apartment along with a Remington Winchester, Model 870 shotgun were also recovered from respondent's apartment. All items were identified, in court, as belonging to the Pueschels. Upon the arrest of Jerry Mahaffey, numerous

items of the Pueschel's personal property were also recovered and identified as belonging to the Pueschels.

Reginald Mahaffey personally removed a man's ring from his finger, a man's watch and a yellow chain with a crucifix from his pocket, stating "You might as well take these too, because they belong with all that stuff." (R. 2598) All were identified as belonging to Dean Pueschel.

Both defendants gave oral as well as written confessions within a few hours of their arrests. (Appendices B and C) Motions to quash arrest and suppress statements were denied by the trial court. Both defendants claimed their confessions were coerced and involuntary. Both defendants moved to sever their cases and both motions were denied; the trial court holding that the confessions interlocked under *Parker v. Randolph*, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979), and that the defenses of the defendants were complimentary and not antagonistic. Each defendant's confession was admitted into evidence with specific limiting instructions to consider the confession only against the defendant who made it and that each defendant had a right to have his guilt or innocence determined individually. (R. 2987, 3723)

Reginald Mahaffey's 23 page typed court-reported statement included his admission to attempting to murder 11-year-old Rickey by smothering and choking him and ordering his brother, Jerry, to stab the boy when he would not stop struggling. He admitted to clubbing Dean Pueschel over the head with a baseball bat taken from Rickey's bedroom. He admitted to raping Jo Ellen Pueschel in both the kitchen and the living room of her home. Reginald admitted to stealing numerous items of personal property and guns from the Pueschel apartment. Reginald admitted to ordering Jo Ellen and her son to

lie down on the floor and he admitted to beating Jo Ellen on the head with the .357 Magnum pistol which he had in his possession at the time of his arrest. Reginald admitted that just prior to beating Jo Ellen, he and Jerry had a conversation in which they agreed "to kill this bitch too." Reginald thought that as he was leaving the Pueschel home his brother was "finishing the lady and her son off with the bats," but he was not sure. (Appendix B-14)

Reginald Mahaffey testified on his own behalf. Jerry Mahaffey did not testify. Reginald denied killing Dean and Jo Ellen Pueschel, denied beating Rickey and claimed he was never at 2519 W. Jerome. (R. 3655-3666) Respondent claimed to have bought the Pueschel's personal property from a man he did not know who came to his apartment looking for his roommate, Morriell Redmond. Reginald claimed to have purchased the guns to protect his brothers and sisters and nieces and nephews. (R. 3693-3694)

Respondent further testified that all the police officers as well as the Assistant State's Attorney were liars (R. 3684) and claimed that the photograph taken of him after his court-reported confession was a fake and produced by trick cameras. (R. 3689-3690) Reginald admitted doing the talking during his court-reported statement but claimed he memorized what to say from what Sergeant Byrne told him. (R. 3691-3692)

In rebuttal, the People offered certified copies of conviction for attempt burglary and robbery. (R. 3714) Defendant had been sentenced in 1981 to 4 years in the Penitentiary.

Jerry Mahaffey's defense was the same as Reginald's; the confession was the result of police brutality. Defense

counsel argued that the Assistant State's Attorney was not called in by police officers to take the statements, "until they got those two men where they wanted them, in a police station, with a story down pat." (R. 3838-3839)

The jury found each defendant guilty of the murder of Dean Pueschel, the murder of his wife, Jo Ellen Pueschel, the attempt murder and aggravated battery of their 11 year old son Rickey, home invasion, rape, armed robbery, theft and residential burglary. Respondent, Reginald Mahaffey was found not guilty of deviate sexual assault.

The same jury found each defendant eligible for the death penalty based on two aggravating factors:

1.) the defendant had been convicted of murdering two or more individuals and the deaths were the result of either an intent to kill more than one person or of separate premeditated acts;

2.) the murdered individual was killed by the defendant and not by another party to the crime or simply as a consequence of the crime, intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm, and the murdered individual was killed during the course of one of the following felonies: armed robbery, rape, home invasion or residential burglary. (R. 4270-4271, R.C. 141-142)

The jury also found no mitigating factors sufficient to preclude imposition of the death penalty.

At the death penalty hearing, the People presented evidence that on March 23, 1984, while awaiting trial on the charges in the case at bar, Reginald Mahaffey held Officer Vernon Williams of the Cook County jail at gunpoint, as he and five other inmates attempted to escape. Reginald Mahaffey beat a lieutenant and threatened to kill Officer Williams. (R. 4023-4025) He twice hit Captain Hunt

on the side of the head, stuck a gun in another Officer's mouth and threatened to kill that officer if the doors were not opened. (R. 4006-4010) Respondent finally surrendered when he was surrounded, but Jerry Mahaffey did escape, only to be apprehended a few days later.

When the trial court imposed sentences upon Reginald Mahaffey, he stated:

> In all my experience, I have never run across a case in which the facts were so brutal, so heinous, so wanton. I suppose I have read about things that have been more brutal than this event, but I myself have never run into anything that would match this cold, calculating terror. (R. 4305-4306)

On direct appeal to the Illinois Supreme Court, the convictions and sentence of death as to Jerry Mahaffey were unanimously affirmed. By a five to two vote, Reginald Mahaffey's conviction and sentence were reversed and remanded for a new trial.

The majority opinion held that the co-defendant's confession did not bear sufficient indicia of reliability to be admissible as substantive evidence against respondent under *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 214 (1986), and under *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987) limiting instructions do not cure this defect. The majority further held that respondent's inability to cross-examine the co-defendant regarding whether or not his confession was voluntary or coerced undercut respondent's claim of coercion and was therefore not harmless. In sum, the majority held that the violation of the Sixth Amendment Confrontation Clause was not harmless because of the inability to cross-examine or confront the witness.

The dissenting Justices rejected this circuitous *per se* rule and relying on *Schneble v. Florida*, 405 U.S. 427, 92

S.Ct. 1056, 31 L.Ed.2d 340 (1972); *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), and *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) held that what is required by a reviewing court when a *Bruton* error has been committed is

> [c]onsideration of the strength of the competent evidence of the defendant's guilt and the probable effect on the jury of the nontestifying co-defendant's confession. (Appendix A-42)

The dissenting Justices found that the overwhelming evidence of Reginald Mahaffey's guilt rendered any *Bruton* error harmless beyond a reasonable doubt.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE CIRCULAR REASONING OF THE MAJORITY OF THE ILLINOIS SUPREME COURT WHICH HELD THAT A SIXTH AMENDMENT VIOLATION CANNOT BE HARMLESS BECAUSE OF THE INABILITY TO CROSS-EXAMINE A NON-TESTIFYING CO-DEFENDANT WHOSE STATEMENT WAS ADMITTED INTO EVIDENCE WITH LIMITING INSTRUCTIONS, IGNORES THE MANDATE OF THIS COURT IN *SCHNEBLE v. FLORIDA* AND *HARRINGTON v. CALIFORNIA*, AND IS A COMPLETE MISINTERPRETATION OF *LEE v. ILLINOIS* AND *CRUZ v. NEW YORK*.

Since *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), this Court has consistently made it clear that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations."

United States v. Hastings, 461 U.S. 499, 509, 103 S.Ct. 1974, 1981, 76 L.Ed.2d 961 (1983). This Court specifically held in *Schneble v. Florida*, 405 U.S. 427, 430, 92 S.Ct. 1056, 1059, 31 L.Ed.2d 340 (1972), that

> The mere finding of a violation of the *Bruton* rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.

Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987), does not hold otherwise. In fact, this Court in *Cruz* reiterated the holding in *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), that the defendant's confession may be considered on appeal in assessing whether any Confrontation Clause violation was harmless. *Cruz*, 107 S.Ct. at 1719. That judgment must be based on the Court's own reading of the record and a determination of whether the State's case would have been "significantly less persuasive" absent the confession of the co-defendant. *Schneble v. Florida, supra*, 405 U.S. at 432; *Harrington v. California, supra*, 395 U.S. at 254.

Nevertheless, the majority opinion of the Illinois Supreme Court refused to follow this Court's interpretation of the Confrontation Clause. The majority held that since the co-defendant's confession did not bear sufficient indicia of reliability to be admissible as substantive evidence against respondent, respondent's inability to cross-examine the co-defendant was automatically reversible error. The Illinois Supreme Court cited *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), but

failed to note that *Lee* was remanded to the Appellate Court of Illinois, Fifth Judicial Circuit to assess the evidence in the entire case to determine whether the Confrontation Clause error was harmless.[1]

As the dissenting Illinois Supreme Court Justices in the case at bar pointedly stated, the majority failed to consider "the strength of the competent evidence of defendant's guilt and the probable effect on the jury of the nontestifying co-defendant's confession." (Appendix A-42) The majority held that the Confrontation Clause error could not be harmless because, as the co-defendant did not testify, "Reginald could not cross-examine him as to whether his confession was coerced or involuntary. Therefore, Reginald's claim of coercion was undercut by his inability to confront Jerry regarding the accusations contained in his statement." (Appendix A-19) In essence, the majority opinion is circuitous and boils down to the following conclusion:

> The confrontation clause violation was not harmless because there was a confrontation clause violation.

The circular reasoning expressed by the majority results in a *per se* rule compelling reversal which flies in the face of every decision of this Court since *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 26 L.Ed.2d 476 (1968). As the dissenting Justices noted, "*Bruton* errors, though

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[1] In *People v. Lee*, 164 Ill. App. 3d 155, 164 N.E.2d 628 (5th Dist. 1987), the Appellate Court held that with respect to the murder of Mattie Darden, the admission of the co-defendant's confession against defendant Lee was harmless beyond a reasonable doubt. With respect to the murder of Odessa Harris, the court held that the admission of the confession did contribute to the verdict.

constitutional in nature, do not mechanically compel reversal." (Appendix A-42)

The failure to follow the dictates of this Court is most egregious in the case at bar since respondent's own confession to the commission of and the intent to commit every crime charged (except deviate sexual assault) was corroborated by the plethora of physical evidence recovered from the respondent and from his apartment, from the scene of the murders, from scientific evidence, as well as respondent's positive identification as one of the murderers by the only surviving victim of the defendants' brutal rampage.

The efficacy of the Sixth Amendment and the cause of justice are not advanced by the application of a *per se* rule where it is further apparent that in this particular case, the jury *did* follow the court's extensive limiting instructions, thus abrogating the danger both *Bruton* and *Cruz* addressed. (See Point II, *infra*.)

II.

WHERE THE RECORD DEMONSTRATES THAT RESPONDENT'S JURY *DID* FOLLOW THE COURT'S EXTENSIVE LIMITING INSTRUCTIONS, WHERE THE RESPONDENT CONFESSED TO COMMITTING AND/OR INTENDING TO COMMIT EVERY CRIME CHARGED IN THE INDICTMENTS, EXCEPT THE CRIME FOR WHICH HE WAS FOUND NOT GUILTY, WHERE RESPONDENT WAS POSITIVELY IDENTIFIED BY THE 11-YEAR-OLD SURVIVING VICTIM AS THE MURDERER OF HIS PARENTS, WHERE THE PHYSICAL AND SCIENTIFIC EVIDENCE CORROBORATED RESPONDENT'S CONFESSION IN ALMOST EVERY DETAIL, AND WHERE RESPONDENT POSSESSED NUMEROUS ITEMS OF THE VICTIMS' PERSONAL PROPERTY WHEN ARRESTED, ANY ERROR WOULD HAVE BEEN CONSIDERED HARMLESS, AS THE DISSENTING JUSTICES SO HELD, HAD A HARMLESS ERROR ANALYSIS BEEN DONE.

In *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) this Court held:

> Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. *Id.* 405 U.S. at 432.

In the case at bar, no truly reasonable possibility exists that Reginald Mahaffey would have been acquitted of the two murders, attempt murder, rape, residential burglary, armed robbery, aggravated battery, theft or home invasion absent the confession of Jerry Mahaffey. The confession of Reginald Mahaffey constitutes a complete admission to committing or being accountable for the commission of as well as the intent to commit each crime charged in the indictments. The testimony of the surviving victim, Rickey Pueschel, almost exactly parallels Reginald Mahaffey's confession in addition to Rickey's in-court identification of defendant as one of his parents' murderers. The physical evidence recovered from defendant,

the murder scene as well as the other testimonial, tangible and scientific evidence admitted at trial was so overwhelmingly consistent and corroborative of respondent's confession that the introduction into evidence of the co-defendant's confession could not possibly have contributed or been a material factor in the jury's verdict.

In both *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1986), and *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987), this Court proceeded on the assumption that the juries involved in those cases disregarded limiting instructions and utilized hearsay declarations as substantive evidence. In *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 1708, 95 L.Ed.2d 176 (1987), this Court noted the "overwhelming probability" of a jury's inability to follow instructions in those types of cases. In the case at bar, however, that "overwhelming probability" was rebutted.

The jury was instructed on numerous occasions to consider each defendant's confession only against the defendant who made the confession. The only crime to which respondent did not confess to either committing or intending to commit was that of deviate sexual assault upon Jo Ellen Peuschel.[2] There was no other testimonial, tangible or scientific evidence admitted at trial to prove that this crime was committed by respondent. The *only* evidence came from the co-defendant's confession which stated that Reginald "had his dick in her mouth." (Appendix C-7) The jury followed the court's instructions by

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[2] The indictment charged that respondent committed the offense of deviate sexual assault in that by force or threat of force Jo Ellen Pueschel was compelled to perform an act of deviate sexual conduct to wit: oral copulation upon respondent in violation of Ill. Rev. Stat. 1981, Ch. 38, §11-3(a).

disregarding the co-defendant's statement and found Reginald not guilty of deviate sexual assault, thus demonstrating that in this case, the overwhelming probability is that the jury *did* follow the court's instructions not to consider the co-defendant's confession against respondent.

Initially, respondent's confession described an intent to burglarize a store, which turned out to be unsuitable for burglarizing, and the fortuitous inability to leave the area because the battery in the van respondent and his brother were driving had died. The defendants walked through the parking lot, came to some apartment buildings and noticed an open window. Reginald removed the screen and both defendants entered the Pueschel apartment. (R. 2902-2903) Reginald stated, "We hit the bathroom first." (Appendix B-6)

At trial, Detective Anthony Graffeo testified that on the ground outside the bathroom window of the Pueschel apartment were the bathroom screen and three plastic shampoo bottles. (R. 2275-2277)

Reginald stated that he picked up a butcher knife in the kitchen, which was about five inches in length, and then both he and his brother entered the "kid's room." (Appendix B-6) The child was lying on his stomach and Reginald stated he got on the boy's back, held a pillow on his head and choked the boy. The child was kicking and "after we struggled with the boy for probably four minutes I told my brother to stab him," and according to Reginald, his brother followed his instructions. (Appendix B-7) Discovering a box of baseball bats in Rickey's room, Reginald claimed his brother also hit the boy over the head a couple of times with one of the bats. (Appendix B-8)

Rickey Pueschel testified at trial that on the night of the murders he was awakened in his bed and found him-

self in a headlock position. He heard two different voices, it was difficult to breathe and he was either hit or he fell back to sleep. (R. 2386-2387) He had been choked. Dr. Aguilera testified that Rickey had a large hematoma around the left eye, a large cut on the left side of the head, skull fracture and multiple stab wounds in Rickey's back and upper chest. (R. 2857-2861)

Reginald explained that he and his brother then proceeded to the other bedroom where Dean and Jo Ellen Pueschel were sleeping. Each brother stood on either side of the bed and simultaneously clubbed Dean Pueschel on the head with baseball bats taken from Rickey's bedroom.

According to Dr. Edward Donaghue, Dean Pueschel's body exhibited deep lacerations of the scalp extending down to the skull, multiple skull fractures, hemorrhages, and multiple pieces pushed below the level of the remaining skull. (R. 3081-3084) The injuries were consistent with being struck by a blunt instrument such as a baseball bat. (R. 3089)

Reginald then related that he took Jo Ellen Pueschel into the kitchen and had sexual intercourse with her, took her into the living room and again had vaginal intercourse with her over the arm of the couch. (Appendix B-9) Reginald was interrupted by Jerry who emerged from the bedroom and explained that Dean Pueschel had a .357 magnum pistol. (Appendix B-10) When Reginald again entered the bedroom, Dean Pueschel was lying on the floor and Reginald proceeded to take jewelry from a jewelry box on the dresser and one of Dean's T-shirts from the dresser drawer. (Appendix B-10)

Detective Graffeo discovered Dean Pueschel on the bedroom floor, battered about the head and bloody. There were numerous puncture wounds on his side. Next to him was an empty gun holster, bloodstains on the bed and a bloody

baseball bat with "Ted Simmons" inscribed on it; a jewelry box and dresser drawers were pulled out. (R. 2266-2268)

Rickey identified the "Ted Simmons" bat as one of his baseball bats which he kept in his room. (R. 2392-2393) The blood found on the "Ted Simmons" bat had type O(n) blood on it; the same as Dean Peuschel. (R. 2804-2806, 3344) No fingerprints were found on the baseball bats.

Respondent's confession related how Jo Ellen Peuschel put on a brown trench coat, took respondent to her car and turned off the car alarm. Reginald then packed a T.V., a tape machine player, an arcade game and a case of tapes into the car along with a rifle, a shotgun, a .357 magnum, a box of 30/30 shells, 2 boxes of 12 gauge shells, a box of .38 special and a box of .357 mags. (Appendix B-11-12) Reginald kept the jewelry in his pocket.

Sergeant Byrne observed Detective Grunhard recover from the back bedroom closet where Reginald was arrested, a stereo dust cover containing 24 pieces of jewelry. (R. 2542) From the nightstand next to where defendant was found hiding, a box of .30 caliber bullets was recovered and from a dresser, a box of 12 gauge shotgun shells was found. (R. 2543) Detective Grunhard also removed a Remington Winchester, model 870 shotgun from a shelf in the bedroom closet as well as three 12 gauge shotgun shells. (R. 2543) Among the jewelry items recovered were a bracelet with the name Rickey inscribed on it, a bracelet with the name of Jo Ellen inscribed thereon and another bracelet with a charm bearing the name of Jo Ellen on it. (R. 2563-2568)

In his confession, Reginald identified all of these items as having been taken by him from the Pueschel apartment on the night of the murders. He further identified the items that were recovered from Jerry Mahaffey's apart-

ment. In court, the guns were identified by Jo Ellen's brother as belonging to Dean Pueschel. (R. 2470-2473)

When respondent was arrested, he told Sergeant Byrne, "You might as well take these too," (R. 2598) and he removed a man's ring from his hand, a man's Seiko watch and a yellow chain with a crucifix attached from his pocket. (R. 2597) In court, Jo Ellen's mother identified these items as having belonged to Dean. (R. 2778-2779)

Respondent's confession then related what he did when he returned to the apartment.

> My brother told me, 'hey, man, we have to kill this bitch too.'
>
> Q. What did you say?
>
> A. 'Man,' I whispered, 'I know, man, don't make her panic, you know.' (Appendix B-13)

Reginald stated, "I told her to lay down and her son mumbled, 'Mom, lay down, just lay down, mom,' something like that." Jo Ellen tried to say something to her son and that is when Reginald hit her in the head with the .357 pistol; her son laying next to her on the floor. The discussion between Reginald and Jerry to murder Jo Ellen "too" occurred just prior to respondent's beating Jo Ellen in the head with the .357 pistol. (Appendix B-13-14)

Rickey Pueschel testified at trial, that when he awoke again, he walked to the kitchen in a daze, saw his mother being held by one man, while another walked through the back door. Rickey testified that he and his mother were forced to lie down on the floor on their stomachs. Rickey saw his mom crying while being hit and then he did not remember what happened. He either fell asleep or was struck. (R. 2387, 2390, 2451)

At trial, Rickey testified, "Yes, I had a pretty good glance at them when I was in—when I walked into the kitchen and saw my mother and the two men." (R. 2394) Rickey identified both Jerry Mahaffey and Reginald Mahaffey, in court, as the two men he saw on the night of his parents' murders. (R. 2394)

Detective Graffeo found Jo Ellen Pueschel lying face down with a pool of blood under her head. Her head was obviously battered, the skin was split on the top and her eye was swollen. (R. 2261) Lying on the floor between the living room and the dining room was a dark brown ladies' trenchcoat. (R. 2333-2334)

Dr. Edward Donaghue discovered large deep lacerations of the scalp that extended down to the skull on the right side of her head, the back of the head toward the top and the back of the head in the middle. There was bleeding over the entire surface of the brain, several hemorrhages, swelling of the brain and skull fractures. (R. 3066) Dr. Donoghue determined that Jo Ellen died from craniocerebral injuries to the skull and brain. (R. 3075)

The partially loaded .357 magnum revolver found on the nightstand next to where Reginald Mahaffey had been lying when arrested had red stains which appeared to be blood. (R. 2539-2540) The blood was subsequently determined to be the same type as Jo Ellen Pueschel. (R. 2818) The .357 magnum was identified by Jo Ellen's brother as having belonged to Dean Pueschel. (R. 2476)

The majority opinion of the Illinois Supreme Court misstates the evidence with regard to Reginald's confession by stating, "Finally, Reginald stated that Jerry hit the woman on the head with a baseball bat as she lay on the kitchen floor." (Appendix A-18) In fact, respondent stated that as he was leaving he heard "solid hits," but stated,

"That's the thought I had. I didn't know for sure, I only thought that." (Appendix B-14) He did *not* state that Jerry did, in fact, hit Jo Ellen with a baseball bat. Nevertheless, it should be noted that the "Reggie Jackson" bat discovered by Detective Graffeo on the washing machine in the kitchen had type B(n) blood on it, the same as Jo Ellen. (R. 2258, 2344, 2804, 2811-2812, 3343)

Respondent then explained how he and his brother took the loaded up Pueschel car, dropped off the Pueschel's belongings and abandoned the car, "hoping that somebody else would rip off the car where they would discover fingerprints I may have left that would be no good." (Appendix B-14-15) He did try to wipe off fingerprints with a T-shirt.

Sergeant Frank Piercynski had previously discovered the Pueschel's car exactly where defendant stated that he and his brother abandoned it. (R. 2494-2495)

When shown a photograph of the Pueschel family by Assistant State's Attorney Miller respondent stated:

A. Yes, I recognize those people.

Q. Who are those people in this photograph?

A. Those are my victims. (Appendix B-17)

Also admitted as substantive evidence against Reginald Mahaffey was the testimony of Sergeant Byrne and his conversation with Cedric Mahaffey. (The admission of this testimony was not raised as an issue on appeal, nor would there have been a basis for doing so.)

Cedric Mahaffey told the officers that he knew who committed the double murders on the north side of Chicago. (R. 2718) He stated that a .357 mangum, a 12 gauge shotgun and a .30 caliber carbine rifle had been taken from

the apartment of the murder victims. (R. 2721) At first he did not want to reveal the names of the two men involved, but subsequently told Sergeant Byrne that they were his brothers, Reginald and Jerry. (R. 2722) Cedric had told the officers that the victims were beaten and that the boy was beaten and stabbed. (R. 2735) Cedric's information came from what his brothers had told him. (R. 2740) He also told Sergeant Byrne that he did not want to testify against his brothers and he would not do so. (R. 2722)

Cedric had been told that his brothers intended to commit a burglary on the north side of Chicago. The van they had borrowed broke down. Seeing an open window, they crawled through, finding a boy asleep. The defendants beat and stabbed the boy. They then went to another room and upon finding a man and a woman, beat them. The defendants removed items from the house and had sex with the woman. The defendants took a car from the victims and drove to the west side of Chicago. (R. 2749)

This evidence substantially corroborated Reginald's confession on significant details. Although Cedric did not specify which brother committed which particular act, it is clear that Jerry and Reginald were acting in complete concert with one another. Under Illinois law, each was equally guilty for all crimes committed. (Ill. Rev. Stat. 1981, ch. 38, sec. 5-2(c)).

What is abundantly clear is that respondent's own confession contains all of the elements necessary to prove each and every crime charged under Illinois law. Respondent admitted to clubbing, choking and attempting to smother Rickey Pueschel and he admitted to ordering his brother to stab the boy, thus clearly being responsible as well as accountable (see Ill. Rev. Stat. 1981, ch. 38, sec. 5-2(c)) for the attempt murder of Rickey.

Respondent admitted to beating Jo Ellen Pueschel with the .357 magnum, which he possessed at the time of his arrest, and agreeing with his brother that she was to be killed. Respondent's pistol beating alone clearly could have been the cause of Jo Ellen's death, but any further action taken by his brother was specifically agreed to by respondent.

Respondent admitted to clubbing Dean Pueschel with a baseball bat. According to medical testimony, the cause of death was multiple stab wounds with craniocerebral injuries to the skull and brain as a significant contributing condition. (R. 3089) It is true that respondent did not admit to stabbing Dean Pueschel or even knowing that his brother may have stabbed him. However, he admitted that the agreed upon intent was in fact, to kill the victims when he responded, "I know man," when his brother said, "we have to kill this bitch, *too.*" (emphasis added) Respondent's actions alone were also a significant contributing factor in the cause of death of Dean Pueschel.

It is readily apparent that the co-defendant's confession added nothing to the case against Reginald Mahaffey, except to state that Reginald rather than Jerry stabbed the boy. Yet, Reginald admitted that stabbing the boy was certainly what he intended since the child would not stop struggling. Jerry also stated Reginald stabbed Dean Pueschel four or five times, yet Reginald admitted in his confession that the murder of the victims was the agreed upon plan. There was simply no defense under Illinois law in the body of Reginald's confession which was either refuted or placed into question by the co-defendant's confession, a significant factor in the case of *Lee v. Illinois*, 476 U.S. 530, 103 S.Ct. 2056, 90 L.Ed.2d 514 (1986), not present in the case at bar. In his brief on direct appeal to the Illinois Supreme Court, respondent conceded that the confessions of the defendants "matched" and "inter-

locked" in all "essential respects." (Deft. Br. No. 61822 in the Illinois Supreme Court, p. 60).

Respondent's guilt for committing all crimes charged, except deviate sexual assault, was plainly apparent from the record on appeal. The jury in this case clearly did follow the trial court's limiting instructions not to consider the co-defendant's confession in determining respondent's guilt. Had the majority of the Illinois Supreme Court followed the mandates of this Court and not pronounced a *per se* rule by its circular reasoning, respondent's convictions would have and should have been affirmed since any constitutional error was, at most, harmless. There is no reasonable possibility that the co-defendant's confession contributed to the convictions of Reginald Mahaffey.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and opinion of the Illinois Supreme Court.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ
Solicitor General, State of Illinois
TERENCE M. MADSEN
Assistant Attorney General
Attorneys for Petitioner

CECIL A. PARTEE
State's Attorney of Cook County
INGE FRYKLUND
RENEE GOLDFARB *
Assistant State's Attorneys
Of Counsel

* Counsel of Record
(312) 443-5484

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF ILLINOIS,

Petitioner,

vs.

REGINALD MAHAFFEY,

Respondent.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ
Solicitor General, State of Illinois
TERENCE M. MADSEN
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
Attorneys for Petitioner

CECIL A. PARTEE
State's Attorney of Cook County
309 Richard J. Daley Center
Chicago, Illinois 60602
INGE FRYKLUND
RENEE GOLDFARB *
Assistant State's Atttorneys
Of Counsel

* Counsel of Record
(312) 443-5484

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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APPENDIX A

Docket Nos. 61821, 61822 cons.—Agendas 2, 3—September 1988.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. JERRY MAHAFFEY, Appellant.—THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. REGINALD MAHAFFEY, Appellant.

CHIEF JUSTICE MORAN delivered the opinion of the court:

Defendants, Jerry Mahaffey (Jerry) and Reginald Mahaffey (Reginald), were indicted by a Cook County grand jury for the murders of Dean and Jo Ellen Pueschel, and the attempted murder of Richard Pueschel. Defendants were charged as follows in connection with the deaths of Dean and Jo Ellen Pueschel: intentional murder, knowing murder, and felony murder based on residential burglary, home invasion and armed robbery (Ill. Rev. Stat. 1981, ch. 38, pars. 9-1(a)(1), (a)(2) (respectively)); residential burglary based on theft and armed robbery (Ill. Rev. Stat. 1981, ch. 38, par. 19-3); home invasion (Ill. Rev. Stat. 1981, ch. 38, par. 12-11(a)(2)); armed robbery (Ill. Rev. Stat. 1981, ch. 38, par. 18-2(a)); armed violence premised on knowing murder (Ill. Rev. Stat. 1981, ch. 38, par. 33A-2); and theft (Ill. Rev. Stat. 1981, ch. 38, par. 16-1(a)). In connection with the death of Jo Ellen Pueschel, defendants were also charged with felony murder based on rape and deviate sexual assault (Ill. Rev. Stat. 1981, ch. 38, par. 9-1(a)(3)); rape (Ill. Rev. Stat. 1981, ch. 38, par. 11-1(a)); deviate sexual assault (Ill. Rev. Stat. 1981, ch. 38, par. 11-3(a)); and armed violence premised on rape and deviate sexual assault (Ill. Rev. Stat. 1981, ch. 38, par. 33A-2). In connection with the assault on Richard Pueschel, defendants were charged as follows: attempted murder (Ill. Rev. Stat. 1981, ch. 38, par. 8-4); aggravated battery (Ill. Rev.

Stat. 1981, ch. 38, par. 12-4(a)); aggravated battery premised on use of a deadly weapon (Ill. Rev. Stat. 1981, ch. 38, pars. 12-4(b)(1)); aggravated battery of a child (Ill. Rev. Stat. 1981, ch. 38, par. 12-4.3(a)); home invasion (Ill. Rev. Stat. 1981, ch. 38, par. 12-11(a)(2)); armed violence based on attempted murder (Ill. Rev. Stat. 1981, ch. 38, par. 33A-2); and armed violence premised on aggravated battery (Ill. Rev. Stat. 1981, ch. 38, par. 33A-2). All of the armed violence counts were dismissed on the State's motion. The defendants were tried jointly before the same jury on each of the remaining counts. At the conclusion of the State's case in chief, the trial court granted Jerry's motion for a directed verdict on the deviate sexual assault charge. At the conclusion of all of the evidence, the jury found Reginald not guilty of deviate sexual assault, but found both defendants guilty of all remaining charges. The State requested a hearing to consider whether the death penalty should be imposed. (Ill. Rev. Stat. 1981, ch. 38, par. 9-1(d).) The jury which convicted the defendants also sat at the sentencing phase. The jury found defendants eligible for the death penalty, and found there were no mitigating factors sufficient to preclude imposition of the death penalty. The defendants' death sentences were stayed (107 Ill. 2d R. 609(a)), pending direct appeal to this court (Ill. Const. 1970, art. VI, §4(b); 107 Ill. 2d R. 603). This court consolidated the defendants' appeals after oral arguments in these cases.

On April 30, 1986, while defendants' appeals were pending in this court, the United States Supreme Court filed its opinion in *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712. The Court held that a defendant may rely solely on evidence concerning the selection of the jury at his own trial to establish that a prosecutor has unconstitutionally exercised peremptory challenges against potential jurors solely on account of race. (*Batson*, 476 U.S. at 95, 90 L. Ed. 2d at 87, 106 S. Ct. at 1722.) The court subsequently held that *Batson* was retroactively applicable to all cases pending on direct review when the decision was announced. *Griffith v. Ken-*

tucky (1987), 479 U.S. 314, 328, 93 L. Ed. 2d 649, 661, 107 S. Ct. 708, 716.

In light of the *Batson* and *Griffith* decisions, this court issued supervisory orders in these cases on October 26, 1987. In those orders, we retained jurisdiction of these causes and directed the trial court to conduct an expedited hearing to permit the defendants to present evidence to substantiate their claim of unconstitutional discrimination in the exercise of peremptory challenges. Our supervisory order also stated that if the trial court found that a *prima facie* showing of such discrimination had been made, it should then determine whether or not there is a neutral explanation by the State for the exercise of the questioned peremptory challenges. The court conducted the hearing on November 30, 1987, and found that defendants had failed to establish a *prima facie* case of discrimination.

On return of the cases to this court, defendants raise numerous issues alleging errors at all stages of the proceedings. The issues we must address as to Jerry are: (1) whether the trial court erred in finding that Jerry failed to establish a *prima facie* case of discrimination under *Batson*; (2) whether the trial court erred in excusing a venireman for cause without further inquiry into her sentiments regarding the death penalty; (3) whether the trial court erred in admitting Richard Pueschel's in-court identification of Jerry as one of the perpetrator of the crimes; (4) whether a comment made by Jo Ellen Pueschel's mother from the gallery during the redirect examination of Reginald denied Jerry a fair trial and a fair sentencing hearing; (5) whether some of the prosecutor's remarks during trial and closing argument had the effect of shifting the burden of proof to Jerry and undermined the presumption of his innocence; (6) whether the State failed to prove the *corpus delicti* of the rape; (7) whether the prosecutor's remarks during the sentencing phase sought to minimize the jury's responsibility for determining the appropriateness of death, in violation of *Caldwell v. Mississippi* (1985), 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633; (8) whether the trial court erred in refusing to

instruct the jury that if it failed to sentence Jerry to death, the court would sentence him to a term of natural life; (9) whether the trial court erred in holding a joint death penalty hearing; and (10) whether Jerry's death sentence is excessive given his "light criminal background." Jerry also asks that we reconsider our prior cases upholding the constitutionality of the Illinois death penalty statute.

Reginald raises the same issues as does Jerry. Reginald raises four additional issues: (1) whether the trial court erred in failing to grant a severance because the admission of Jerry's confession implicating Reginald in the crimes denied him his right to confront witnesses; (2) whether the trial court erred in finding Reginald fit to proceed at trial without requiring a full examination of him; (3) whether the trial court erred in admitting a medical record as past recollection recorded during his pretrial suppression hearing; and (4) whether the trial court erred in denying Reginald's motion to quash his arrest and suppress evidence. Because we hold that the trial court erred in failing to grant a severance, and conclude that Reginald's case must be remanded for a new trial, we need not address the other issues raised in his brief. We therefore limit our recitation of the testimony introduced at the guilt and sentencing phases to only those facts which are relevant to the issues raised by Jerry.

The record reveals that on the morning of August 29, 1983, Joseph Heinrich found the dead bodies of his daughter, Jo Ellen Pueschel, and his son-in-law, Dean Pueschel, in the Pueschel home. Mr. Heinrich found his grandson, Richard Pueschel, severely beaten and wandering near the alley by the family home. Several items were missing from the Pueschel home, including: a .357 magnum revolver; a Zenith video recorder and several videotapes; an Atari video game console and seven game cartridges; several items of jewelry belonging to all three victims; and the Pueschels' 1982 red Chevrolet Camaro.

Eleven-year-old Richard Pueschel testified that during the late evening of August 28, or the early morning of

August 29, 1983, he awoke to find himself in a headlock. He heard two separate voices tell him to "shut up and be cool." Richard further testified that he either fell back asleep or was knocked out, and later woke up and walked into the kitchen "in a daze." Once in the kitchen, he was told to lie on the floor next to his mother. Richard testified what while he was lying on the floor, he could see his mother lying on the floor next to him out of the corner of his eye. He stated that he could see she was being struck. He could not remember what happened to him at that time. At the conclusion of his direct testimony, Richard identified both defendants as being the two men who were in his home that night. On cross-examination, Richard admitted that he had been unable to identify the defendants in a line-up conducted while he was being hospitalized for his wounds, and denied having seen the defendants' pictures in the newspaper. Richard further testified that he had described the assailants to Detective Ryan of the Chicago police department. He described one assailant as being 5 feet 10 inches to 5 feet 11 inches in height, medium build, weighing between 160 to 180 pounds, wearing a medium afro, possibly having a scar on his left cheek. He described the other assailant as being 5 feet 9 inches or 5 feet 10 inches in height, "skinny" build, weighing between 150 to 170 pounds, wearing his hair in a short afro and having a short mustache. He denied giving any other description to the police.

Chicago police Detective Anthony Graffeo testified that his investigation of these crimes began at the Pueschel home on the morning of August 29, 1983. Detective Graffeo acknowledged that his report concerning the incident contained a description of the assailants which differed from the description Richard gave to Detective Ryan. Detective Graffeo's report indicated that one assailant was a 25- to 30-year-old black male, 6 feet 2 inches in height, 210 pounds, with a "scraggly" beard and wearing a white shirt. The second assailant was described in the report as being a light-complected black or Latino male, approximately 25 to 30 years of age, 5 feet 4 inches to 5 feet

6 inches in height, weighing 125 pounds and wearing dark clothing. Detective Graffeo stated that his report was based upon a canvass of residents of the apartment building in which the Pueschels resided.

Sergeant Frank Piercezynski of the Chicago police department testified that while on duty on August 30, 1983, he discovered a 1982 red Chevrolet Camaro in a parking lot at 2245 West Lake Street. The automobile was later identified as belonging to the Pueschels.

Sergeant John Byrne of the Chicago police department testified that at approximately 2 a.m. on September 2, 1983, he met with one of defendants' brothers, Cedric Mahaffey. Based on the information received from Cedric, the Chicago police arrested defendants and seized from their residences certain property which belonged to the Pueschels. The property seized from Jerry's residence included the Zenith video recorder and the Atari video game console and game cartridges. The property recovered from Reginald's apartment included the .357 Magnum revolver and 24 pieces of jewelry. Sergeant Byrne also testified that Reginald removed a man's ring from his hand and a watch from his back pocket after he was arrested. The ring and the watch were later identified at trial as also belonging to Dean Pueschel.

Sergeant Byrne admitted on cross-examination that despite Cedric Mahaffey's knowledge of facts concerning the crimes which were unknown to the general public, he was never arrested nor were his fingerprints compared to those found in the Pueschel home. Sergeant Byrne also admitted that Cedric Mahaffey is a light-complected black male.

Upon further cross-examination, Reginald's counsel inquired into certain statements Cedric Mahaffey made to Sergeant Byrne. Based upon this line of questioning, the State was allowed, over defense counsel's objection, to inquire on redirect examination into the substance of the conversation Sergeant Byrne had with Cedric Mahaffey.

After the trial court orally instructed the jury to consider the testimony in determining the guilt or innocence of Reginald, Sergeant Byrne testified in substance as follows. He and Detective Charles Grunhard met with Cedric Mahaffey, who told them that "he knew who committed a double murder on the north side of Chicago a couple of days earlier." When asked who had committed the murders, Cedric told the officers that he did not want to tell them who they were until he could be sure of their involvement. Cedric then asked the officers whether any guns were taken. After Sergeant Byrne told him that there were guns taken in the incident, Cedric went on to correctly describe to Sergeant Byrne the guns that were taken in the incident.

Cedric then told Sergeant Byrne that he would not tell him the names of the men who committed the murders but that he would tell him where they lived. Cedric then retrieved a video cassette tape of the film "Papillon" from the trunk of his car, and told Sergeant Byrne that the tape had been taken from the victims' home. Cedric then described how he obtained the tape.

On Thursday, September 1, 1983, at 7 o'clock in the evening, Cedric received a telephone call from a "friend" who asked him to go to the "west side to help him move some stuff." An hour later, he drove with his friend and another person to an apartment on the west side, where he helped them load video equipment and video cassettes into the car. Cedric also saw a .357 Magnum and a 12-gauge shotgun in the apartment.

Cedric and the friend then drove to a location on the south side and carried the items into a house. While carrying the items into the house, the friend told Cedric that "he and the other friend got these items committing a burglary, and that they had to kill a couple of people." Upon hearing this, Cedric removed the videotape from the box he was carrying in order to show the police. When Cedric asked his friend if he was kidding, the friend said, "No[,] [w]e killed a couple of people on the north

side and a little boy lived." When Sergeant Byrne asked who the people were who had committed the murder, Cedric told him their names were Reginald and Jerry, and that they were his brothers.

Cedric then began to relate more of the conversation he had had with one of his brothers regarding the crimes. From the conversation, Cedric learned that Reginald and Jerry had gone to the north side to commit a burglary, but that the van they were driving "broke down." They left the van and crawled through an open window and found a boy asleep. They beat the boy and then went into another room and found a man and a woman. They beat the man and the woman and then had sex with the woman. They removed several items from the house, loading them into the car "that was in the driveway."

Cedric stated that the Tuesday following the crimes, Jerry went to Reginald's house where they divided up the property. Jerry took the rifle, the Atari game and the video recorder, and took them to his brother Terry's apartment. The day before he was arrested, Jerry retrieved the property from Terry's apartment and brought it to his house.

Cedric told Sergeant Byrne that the .357 Magnum and the shotgun would be found where Reginald was staying. Cedric also told Sergeant Byrne that the video equipment and cassettes would be found in Jerry's apartment and the carbine would be found in his brother Terry's apartment.

Assistant State's Attorney Irv Miller testified that both defendants gave statements, each of them admitting complicity in the crimes and implicating the other as well. Over defense counsel's objections, the statements were read to the jury without redacting them to exclude references to the nondeclaring defendant. The jury was instructed that each defendant's statement should only be considered as evidence against the person making the statement.

The substance of Jerry's statement is as follows. On August 29, 1983, Jerry and his brother, Reginald, had discussed committing a burglary on the "north side." Both he and Reginald drove to the corner of Howard and Western Streets, where they were going to burglarize a clothing store. However, Jerry saw a "paddy wagon" in an alley, so Reginald drove the van around the block and parked in a hospital parking lot. After they decided not to burglarize the store, they attempted to start the van but were unable to do so because the battery was "dead." Jerry and Reginald left the van and started walking toward an alley. Seeing an open window, Reginald removed the screen and Jerry entered the apartment with Reginald following behind him.

The room they first entered was the bathroom. They proceeded out of the bathroom and into the "grown-ups room" and then the "boy's room." Both men then entered the kitchen where Reginald picked up a knife. Jerry wiped everything Reginald touched "for not finding fingerprints." They both proceeded into the "little boy's room." Jerry approached the child and tried to strangle him with a towel. They then put a pillow over his head and Reginald stabbed him four to five times. As the boy continued to struggle, Jerry hit the boy over the head with a baseball bat he had found in the boy's room.

Reginald and Jerry each took a baseball bat from the boy's room, and entered another room where they found two people lying in bed. Reginald stood on the left side of the bed next to the woman. Jerry stood on the right side of the bed next to the man. They both proceeded to hit the man on the head with the baseball bats. Reginald took the woman into another room where he forced her to perform fellatio and have vaginal intercourse with him. Jerry went into the room where Reginald and the woman were, but returned to the room in which the man lay and "saw the man pulling a pistol out." Jerry hit the man over the head with the baseball bat and returned to the living room. Reginald asked the woman where the other guns were, to which the woman replied, "there

[were] more above the dresser on the wall." Jerry and Reginald went back into the bedroom in which the man lay to retrieve the weapons. Jerry was unable to remove a "pump and [a] thirty-thirty" because they were locked in a rack on the wall. However, Reginald was successful in removing a shotgun. During this time, the man began to move, and Reginald stabbed him four to five times in the chest and side.

Reginald asked the woman for the keys to her car. The woman accompanied Reginald out to the car so she could turn off the car alarm. He and the woman went back into the house, and he began to load several items from the house into the car.

Jerry then identified the items seized from his residence as well as his brother's residence as being the items taken from the home they had burglarized. These items included a shotgun, a rifle, three boxes of ammunition, a box of "tapes," an "arcade game" and several items of jewelry.

After loading the items into the car, Jerry went back into the house and told the woman to lie down. The boy then said "Ma-ma, Ma-ma," after which she and the boy lay down. Reginald struck her on the head several times with a pistol, causing her death.

Reginald and Jerry drove the car to Reginald's house, where they left the property taken from the home. They then abandoned the car at the Henry Horner projects.

While Reginald's statement corroborated Jerry's statement in many respects, there were differences. For example, Jerry stated that the plan to burglarize the clothing store was abandoned because they saw a police wagon while Reginald claimed that it was abandoned because of the traffic. Jerry stated that he followed behind Reginald and wiped his fingerprints from every item he touched, a fact not mentioned in Reginald's statement. Reginald stated that he had vaginal intercourse with the woman, and that he saw the woman performing fellatio on Jerry. Jerry also stated that Reginald had vaginal intercourse with the woman. However, he did not state that the woman

performed fellatio on him. Rather, he stated that the woman performed fellatio on Reginald. Reginald claimed that Jerry stabbed the boy while Jerry said that Reginald committed the stabbing. Jerry also claimed that Reginald stabbed the man four to five times while Reginald failed to mention the stabbing in his statement. Jerry stated that as the woman lay on the kitchen floor Reginald hit her over the head with the revolver. In contrast, Reginald stated that as he left the house, he could hear "solid hits" which "told him [that Jerry] was finishing the lady and her son off with the bats."

Expert testimony regarding the physical evidence discovered at the scene indicated that several of the fingerprints found matched those of Dean and Jo Ellen Pueschel. None of the prints found at the scene matched either of the defendants' finger or palm prints. However, testimony further indicated that the finger or palm prints of Richard Pueschel and Cedric Mahaffey were never submitted for comparison. The testimony also indicated that the vaginal swab taken from Jo Ellen Pueschel tested positive for the presence of sperm, and that her vagina was "widely patent," but did not show signs of abrasions or trauma. The expert who examined the vaginal swab was unable to determine when intercourse had occurred. Moreover, the expert could not determine the assailant's blood type because the swab did not reveal the presence of "ABO blood substance."

Defendant Jerry Mahaffey's theory at trial was that the police had beaten him and extracted a false confession from him. He contended that he had rehearsed his statement with the police and the assistant State's Attorney prior to the arrival of the court reporter. Jerry also asserted that the lack of identification and physical evidence linking him to the crime created a reasonable doubt as to his guilt. Defendant Reginald Mahaffey's defense at trial echoed Jerry's. In addition, Reginald asserted that Cedric Mahaffey's intimate knowledge of the crimes demonstrated that he was the person who had committed them. Reginald testified in his own behaf, denying that

he had committed the crimes for which he was charged. He at first denied that the Pueschels' property had been recovered from his residence. However, Reginald stated later that he purchased the T.V., jewelry and guns from a man who visited the apartment shortly before he was arrested.

The jury found both of the defendants guilty of murder, attempted murder, home invasion, rape, armed robbery, residential burglary, aggravated battery and theft. Reginald was found not guilty of deviate sexual assault. The State then moved for a death penalty hearing. As previously noted, our recitation of the evidence introduced at the sentencing hearing will be limited to the evidence concerning the sentencing of Jerry only.

The State presented evidence concerning a prison escape in which Jerry participated while he was incarcerated awaiting trial. Vernon Williams, a Cook County correctional officer, testified that on March 23, 1984, at approximately 9 p.m., Reginald, armed with a gun, entered the prison security office with another inmate who was dressed in an officer's uniform. Pointing the gun at Officer Williams, Reginald told the officer to lie on the floor. The witness testified that Jerry Mahaffey entered the office along with two other inmates, and that all of the prison employees present were told to lie on the floor. The witness further testified that as the inmates proceeded to remove some of the officer's uniform, Jerry took $650 from him. The witness indicated that Jerry was armed with a gun at that time. The record shows that Jerry successfully escaped but was recaptured two days later.

The State also introduced into evidence certified copies of Jerry's prior convictions. The record shows that defendant was convicted of robbery in 1974, 1976 and 1981. His record also contains convictions on two counts of theft and one count of retail theft, all in 1980.

In mitigation, Jerry's mother, Myrtis Mahaffey, testified that she had raised the family alone in the Chicago housing projects, where violence and gang fights were com-

mon. She described Jerry as a "fun-loving" person, and said that she loved him and would miss him when asked how his death would affect her.

Jerry testified in his own behalf stating that he had a wife and two children whom he had tried to support by working in a bowling alley as a janitor. He also stated that he wanted to live. Over objection of his counsel, the State questioned him regarding his involvement in the crimes at issue. He denied being present in the Pueschel home. When asked whether he would attempt to escape from prison again, Jerry replied, "I don't know."

Jerry's wife, Carol Mahaffey, testified that Jerry had a close relationship with his daughters. She also stated that she wanted Jerry to live to help support the family and she also wanted her newborn child to know her father.

The jury found Jerry to be over 18 years of age (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(b)) and also found that he had been convicted of two or more murders (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(b)(3)). Finally, the jury found that Jerry had been convicted of murdering someone during the commission of the felonies of armed robbery, rape, home invasion or residential burglary. (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(b)(6)(c)). The jury also found that there were no mitigating factors sufficent to preclude imposition of the death penalty.

The facts which are relevant to our resolution of Jerry's *Batson* claim are as follows. The record reveals that Jerry is black and the victims are white. During *voir dire*, the trial court noted the race of each venireman on their respective juror cards. Certified copies of the relevant juror cards have been included with the record on appeal. The State was given a total of 24 peremptory challenges; eight were exercised against white jurors and seven against black jurors. Jerry's counsel made a motion to dismiss the venire each time the State struck a black venireman from the jury, alleging that the State was improperly excluding blacks from the jury. At the conclusion of *voir dire*, he made another motion to dismiss the venire, alleging that

the State had exercised its peremptory challenges to remove all seven black veniremen who remained after challenges for cause. He stated that one black juror had been accepted by the State as an alternate only after it had exhausted its peremptory challenges.

The trial court reviewed the relevant case law. Without citing to a particular case, the trial court stated that it disagreed with a recent decision of this court which reaffirmed the pre-*Batson* rule that the State is not required to come forward with reasons for the exercise of its peremptory challenges, even where it is responsible for excusing a majority of the black veniremen from the venire. However, the court recognized that it could not require the State to come forward with reasons for the questioned challenges, although it invited the State to do so. The State declined the invitation. The trial court denied Jerry's motion to dismiss the venire.

At the *Batson* hearing held pursuant to our supervisory order, Jerry's appellate counsel made several arguments in support of his claim that he had established a *prima facie* case of discrimination under *Batson*. Counsel argued that the State intended to dismiss all of the black veniremen without seriously considering them for jury service. He asserted that this intent was demonstrated by the fact that the State made no special inquiry of the prospective black jurors during *voir dire*. He also emphasized that the State had removed all of the black veniremen who remained after challenges for cause, and that the State's action caused the trial court to ask the State to explain the reasons for its challenges. He concluded that these facts established a *prima facie* case of discrimination.

The State made several arguments in support of its position that defendant had failed to establish a *prima facie* case. First, the State noted that it had accepted a black woman as an alternate juror. The State further argued that it had exercised more challenges against white veniremen than black veniremen. Finally, the State gave its criteria for challenging the seven black veniremen,

asserting that the criteria were applied to all veniremen, without regard to race.

The trial judge began his analysis by acknowledging that defendant is black, and that the judge may rely on the fact that "peremptory challenges constitute a jury selection practice that permits discrimination." The judge then commented on his observations of the two assistant State's Attorneys who tried the case, Mr. Malatesta and Mr. Tsukuno. While admitting that he had not had much experience with Malatesta, he stated that as to Mr. Tsukuno:

> "I have had a lot of experience with Mr. Tsukuno, who represented the State in this courtroom for I believe better than a year, maybe even more. And he was what is known as the first chair in this courtroom, which meant that he was responsible for all of the cases and directed the assistants who were in this courtroom.
>
> * * *
>
> I have never found Mr. Tsukuno to be one who practiced any type of discrimination at all.
>
> * * *
>
> So in that respect I don't believe that this presumption that challenges can permit discrimination if they would wish to do so can fairly be a presumption that I can put up and compare against Mr. Tsukuno. He is not that type of person."

The court then went into a detailed analysis of the jurors whom the State struck from the jury, noting that the characteristics of the eight white jurors who were stricken from the jury were the same as the characteristics of the black jurors who were stricken from the jury. The court added that several of the white veniremen shared more than one characteristic with their fellow black veniremen. The court then compared the characteristics of the white and black veniremen the State struck from the jury. For example, the trial court noted that the State

struck one white and one black teacher; one white tradesman and one black tradesman; one white writer and one black writer; one white draftsman and one black engineer; two white veniremen and one black venireman who had been accused of a crime; and five white veniremen and two black veniremen who had been victims of crimes. After considering all of the relevant circumstances, the trial court found that defendant had failed to establish a *prima facie* case of discrimination.

The first issue we address is whether the trial court erred in failing to grant Reginald's motion for a severance. Reginald argues that the admission of Jerry's confession implicating him in the crimes denied him his right to confront witnesses. Jerry does not join in this argument because Reginald testified at trial and was subject to cross-examination concerning his statement implicating Jerry in the crimes.

Citing *Lee v. Illinois* (1986), 476 U.S. 530, 539, 90 L. Ed. 2d 514, 525, 106 S. Ct. 2056, 2061, the State argues that the presumptive unreliability of Jerry's confession was rebutted by sufficient indicia of reliability and trustworthiness to render it independently admissible against Reginald. The defendant in *Lee* was charged along with a codefendant, Thomas, with the commission of a double murder. (*Lee*, 476 U.S. at 531, 90 L. Ed. 2d at 520, 106 S. Ct. at 2057.) Neither defendant testified; however, the trial court expressly relied on Thomas' confession in determining Lee's guilt. On appeal, the Supreme Court was asked to decide whether the use of Thomas' confession at their joint trial violated Lee's rights under the sixth amendment confrontation clause as applied to the States through the fourteenth amendment. The court held that Thomas' confession did not bear sufficient indicia of reliability; therefore, the confession could not be used as substantive evidence against Lee. *Lee*, 476 U.S. at 546, 90 L. Ed. 2d at 530, 106 S. Ct. at 2065.

The Supreme Court began its analysis by stating that the circumstances surrounding Thomas' confession did not establish that the confession was reliable. The court noted

that Thomas originally refused to talk to the police and only did so after he learned that Lee had implicated him in the murders and had urged him to share "the rap" with her. The Court further noted that the "statement was given in response to the questions of police, who, having already interrogated Lee, no doubt knew what they were looking for, and the statement was not tested in any manner by contemporaneous cross-examination by counsel, or its equivalent." *Lee*, 476 U.S. at 544, 90 L. Ed. 2d at 528, 106 S. Ct. at 2064.

The Supreme Court also rejected the contention that Thomas' confession was reliable because it "interlocked" with Lee's on some points. The Court stated that the confession diverged in many respects, including Lee's role in the planning of one of the murders, the part she played in the facilitation of the other murder, "and certain factual circumstances relevant to the couple's premeditation." (*Lee*, 476 U.S. at 545-46, 90 L. Ed. 2d at 529, 106 S. Ct. at 2065.) Four justices dissented, stating that Thomas' statement was clearly against interest and did not attempt to shift the blame to Lee. (*Lee*, 476 U.S. at 553, 90 L. Ed. 2d at 534, 106 S. Ct. at 2069 (Blackmun, J., joined by Burger, C.J., Powell and Rehnquist, JJ., dissenting).) Finally, the dissent noted that Thomas' confession was corroborated not only by Lee's confession but also by the physical evidence introduced at trial, and concluded that these facts rendered the confession reliable. *Lee*, 476 U.S. at 554-57, 90 L. Ed. 2d at 535-37, 106 S. Ct. at 2069-71.

Here, the State does not argue that the circumstances surrounding Jerry's confession demonstrate that it bears sufficient indicia of reliability. The State relies instead on the purportedly "interlocking" nature of the confessions and testimony adduced at trial which it claims corroborates the confession.

The State essentially ignores the fact that in almost every instance, the confessions diverge on the question of who was responsible for the attacks on the Pueschels. Just as in *Lee*, these differences "go to the very issues

in dispute at trial: the roles played by the two defendants in the" crimes for which they were charged. (*Lee*, 476 U.S. at 546, 90 L. Ed. 2d at 529, 106 S. Ct. at 2065.) For example, in his confession, Reginald claimed that Jerry stabbed the boy. Jerry stated in his confession that Reginald was responsible for the stabbing. Both Reginald and Jerry stated that Reginald had vaginal intercourse with the woman. However, Reginald claimed that the woman performed fellatio on Jerry, while Jerry claimed the woman performed fellatio on Reginald. Reginald never mentioned stabbing the man. By contrast, Jerry claimed Reginald stabbed the man four to five times. Finally, Reginald stated that Jerry hit the woman on the head with a baseball bat as she lay on the kitchen floor. Jerry claimed that Reginald delivered the final blows with a revolver.

These discrepancies are not only significant but are the same kind of "buck-passing posturing" the *Lee* dissenters identified as the earmark of a truly unreliable confession. (*Lee*, 476 U.S. at 548, 90 L. Ed. 2d at 531, 106 S. Ct. at 2066 (Blackmun, J., joined by Burger, C.J., Powell and Rehnquist, JJ., dissenting).) We therefore find that under either the majority or the dissenting views expressed in *Lee*, Jerry's confession would be inadmissible as substantive evidence against Reginald. The fact that the jury was instructed not to consider Jerry's statement against Reginald or that Reginald's own confession was admitted against him does not cure this defect. *Cruz v. New York* (1987), 481 U.S. 186, 193-94, 95 L. Ed. 2d 162, 172, 107 S. Ct. 1714, 1719.

We also disagree with the State's argument that the error was harmless and did not affect the verdict. Jerry's statement implicated himself as well as Reginald in the crimes. Reginald's statement was similarly inculpatory, and mirrored Jerry's statement in many of its details. Both defendants attempted to demonstrate at trial that the inculpatory statements they made were coerced and involuntary. Because Reginald chose to testify, Jerry was

able to cross-examine him regarding the part that coercion may have played in obtaining his confession. However, because Jerry did not testify, Reginald could not cross-examine him as to whether his confession was coerced or involuntary. Therefore, Reginald's claim of coercion was undercut by his inability to confront Jerry regarding the accusations contained in his statement. Given this set of facts, Reginald's convictions must be reversed and the cause remanded for a new trial.

We now address the remaining issues raised by Jerry. The first issue he raises is whether the trial court's finding that he failed to establish a *prima facie* case of racial discrimination under *Batson* was erroneous.

As previously stated, the United States Supreme Court has held that the equal protection clause forbids a prosecutor from peremptorily challenging potential jurors solely on account of race or on the assumption that black jurors as a group will be unable to impartially consider the prosecutor's case against a black defendant. (*Batson v. Kentucky* (1986), 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83, 106 S. Ct. 1712, 1719.) *Batson* requires that a defendant first establish a *prima facie* case of discrimination. (476 U.S. at 93-94, 90 L. Ed. 2d at 85-86, 106 S. Ct. at 1721.) Once the defendant establishes a *prima facie* case, the burden shifts to the prosecution to come forward with race-neutral reasons for striking the black veniremen. 476 U.S. at 97, 90 L. Ed. 2d at 88, 106 S. Ct. at 1723.

To establish a *prima facie* case, a defendant must first show that the prosecutor exercised his peremptory challenges to remove members of a cognizable racial group from the venire and that defendant is a member of that group. (*Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87, 106 S. Ct. at 1723.) The defendant may then "rely on the fact * * * that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate,' " in demonstrating "that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the

veniremen from the petit jury on account of their race." *Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87-88, 106 S. Ct. at 1723, quoting *Avery v. Georgia* (1953), 345 U.S. 559, 562, 97 L. Ed. 1244, 1247-48, 73 S. Ct. 891, 892.

Jerry has met the first element of the *Batson* test for establishing a *prima facie* case of discrimination. Jerry is black and the State exercised peremptory challenges to remove from the venire certain members of his race. Therefore, the only question which remains is whether, considering "all relevant circumstances," he has established a *prima facie* case of discrimination. A trial court's determination that a defendant has failed to establish a *prima facie* case of discrimination will not be overturned unless it is against the manifest weight of the evidence. *People v. Evans* (1988), 125 Ill. 2d 50, 71.

The relevant circumstances a trial court may consider when determining whether a *prima facie* case of discrimination has been established include: a " 'pattern' of strikes against black" veniremen; "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges" (*Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88, 106 S. Ct. at 1723); the disproportionate use of peremptory challenges against blacks; whether the excluded blacks were a heterogeneous group sharing race as their only common characteristic; the level of black representation in the venire as compared to the jury; the race of the defendant and the victim; and the race of the witnesses (*Evans*, 125 Ill. 2d at 63-64). However, "the court must avoid arbitrarily deciding this delicate question solely from the number of blacks peremptorily challenged." *Evans*, 125 Ill. 2d at 64, citing *People v. Hooper* (1987), 118 Ill. 2d 244, 247-49 (Ryan, J., specially concurring.)

Considering the circumstances in light of the actual facts of this case, we conclude that the trial court's finding that Jerry failed to establish a *prima facie* case of discrimination was not against the manifest weight of the evidence. Jerry does not contend that the State exercised a pattern of strikes against the black veniremen, nor does he

contend that the excluded veniremen are as heterogeneous as the community as a whole, sharing race as their only common characteristic. Indeed, as the trial court's thoughtful analysis demonstrates, the excluded veniremen shared many characteristics with their fellow veniremen.

Jerry's main assertion is that because the State excluded all seven black veniremen who remained after challenges for cause, and the court asked the State to offer explanations for those seven challenges, he has established a *prima facie* case. This argument assumes too much. Mere numbers do not establish a *prima facie* case of discrimination. (*Hooper*, 118 Ill. 2d at 247-49 (Ryan, J., specially concurring).) Furthermore, the fact that the trial court, relying on pre-*Batson* case law, invited the State to come forward with reasons for the questioned challenges does not establish a *prima facie* case. The court's comments merely demonstrate that it was under the same misapprehension as defendant; that a *prima facie* case of discrimination is demonstrated through mere numbers.

Jerry argues that the trial court's reliance on "apparent explanations" for the State's challenges demonstrates that the trial court "confused the [defendant's] duty to present a *prima facie* case * * * and the prosecutor's duty to explain the challenges once a *prima facie* case is established." The record reveals, however, that rather than relying on "apparent explanations" for the State's challenges, the trial court merely reviewed the characteristics of the stricken jurors to determine their heterogeneity. This is a relevant circumstance which a trial court may consider when determining a *prima facie* case of discrimination. *Evans*, 125 Ill. 2d at 63-64.

Jerry also makes several related arguments which challenge the trial judge's consideration of his previous experience with Assistant State's Attorney Tsukuno. Jerry argues that the trial judge's consideration of Mr. Tsukuno's prior conduct in other cases "ignores settled law that a defendant may establish a case of racial discrimination solely on the record of his own trial, without regard

to a prosecutor's conduct in other cases"; the fact that Mr. Tsukuno is of Japanese-American heritage does not defeat the existence of a *prima facie* case; the trial court improperly discounted "the element of the *prima facie* case that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate"; and the trial court's "praise of the prosecutor" is irrelevant since Mr. Tsukuno's trial partner stated for the record the names of the jurors against whom the State exercised its peremptory challenges.

Jerry's arguments ignore the fact that trial judges "are familiar with local conditions and prosecutors, and can draw upon their power of observation and judicial experience as a guide in distinguishing a true case of discrimination from a false one." (*Evans*, 125 Ill. 2d at 67, citing *People v. Wheeler* (1978), 22 Cal. 3d 258, 281, 583 P.2d 748, 764, 148 Cal. Rptr. 890, 905.) By asserting that Mr. Malatesta stated for the record the names of the jurors whom the State peremptorily challenged, Jerry seems to suggest that Mr. Tsukuno played no part in *voir dire*. This assertion is not borne out by the record, which demonstrates that Mr. Tsukuno participated not only in *voir dire*, but in all proceedings from indictment through post-trial motions. The record shows that the trial judge used his experience, as well as his superior knowledge of local conditions and prosecutors, in determining that the State's peremptory challenges were not motivated by impermissible racial-group bias. We see no reason to disturb this finding.

Jerry next contends that the trial court erred in excusing a venireman for cause without further inquiry into her feelings regarding the imposition of the death penalty. During the trial court's *voir dire* of venireman Patricia Botta, the following colloquy occurred:

> "[THE COURT]: Do you have any conscientious, religious, or moral scruples against the imposition of the death penalty?
>
> [VENIREMAN BOTTA]: I really would not be for it, sir.

Q: Are you saying, in effect, then that under no circumstances would you sign your name to a death penalty verdict?

A: I really don't believe I could.

Q: Okay. I would be giving instructions concerning the criteria or standards that a jury is to follow or consider in coming to a conclusion as to whether a case is appropriate for the death penalty or inappropriate for the death penalty. Would you be able to follow those instructions in arriving at a verdict unanimously with eleven other jurors?

A: I don't know really how to answer that, you know, because my feelings are definitely—I don't think I could really live with the situation."

Jerry contends that venireman Botta's responses were ambiguous, and that it was improper for the trial court to excuse her for cause without further inquiry into her feelings regarding the death penalty.

A venireman who expresses only general objections to the death penalty may not be excused for cause. (*Witherspoon v. Illinois* (1968), 391 U.S. 510, 522, 20 L. Ed. 2d 776, 784-85, 88 S. Ct. 1770, 1777.) The venireman's views regarding the death penalty will warrant exclusion for cause only where they will " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt* (1985), 469 U.S. 412, 420, 83 L. Ed. 2d 841, 849, 105 S. Ct. 844, 850, quoting *Adams v. Texas* (1980), 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589, 100 S. Ct. 2521, 2526.

Venireman Botta's response to the trial court's question is almost identical to the responses discussed in *People v. Del Vecchio* (1985), 105 Ill. 2d 414, 431, and *People v. Gacho* (1988), 122 Ill. 2d 221, 238-40. In *Del Vecchio*, the venireman stated, " 'I don't think I have the right to [impose the death penalty].' " (*Del Vecchio*, 105 Ill. 2d at 431.) This court held that the words "I think" did not render the venireman's response vague or ambiguous. (*Del Vec-*

chio, 105 Ill. 2d at 431.) The venireman in *Gacho* responded, " 'No, I would rather not,' " when asked if she could consider imposing the death penalty under any circumstance. (*Gacho*, 122 Ill. 2d at 240.) Again, this court found that the trial court's questions in *Gacho* demonstrated that the venireman's views concerning the death penalty would prevent or substantially impair the performance of her duties as a juror. *Gacho*, 122 Ill. 2d at 240.

In this case venireman Botta was asked questions about her feelings regarding the death penalty. To each of these questions she gave the following responses, respectively: "I really would not be for it"; "I really don't believe I could"; and, "I don't know how to answer that, you know, because my feelings are definitely—I don't think I could really live with the situation." The record demonstrates that the trial court varied the form of the question in an attempt to elicit a different response; however, the venireman remained unwavering in her views. Given the trial court's superior position to determine what venireman Botta intended to convey with her responses, we cannot say on this record that the trial court erred in excusing her.

Jerry contends next that the trial court erred in admitting Richard Pueschel's in-court identification of him as one of the two "men that were in [the Pueschel residence] on August 29, 1983." Jerry asserts that everything he received from the State during discovery indicated that no one would be able to identify him as one of the perpetrators of the crimes. He further asserts that Richard Pueschel admitted that he had a 15- to 20-minute conversation with Assistant State's Attorney Malatesta a month prior to trial, and that Assistant State's Attorney Malatesta admitted during that interview Richard had told him he was "99 per cent sure" he could identify Reginald and Jerry as the perpetrators. Jerry concludes that the State was required to disclose Richard's oral statement that he could identify him, and that the trial court erred in failing to either strike the testimony or declare a mistrial.

Supreme Court Rule 412(a)(i) provides in pertinent part:

"412. Disclosure to Accused

(a) * * * the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:

(i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements." 107 Ill. 2d R. 412(a)(i).

It is clear that the State is required to disclose a witness' oral statements only if they are in "memoranda containing substantially verbatim reports of their oral statements." Both parties agree that Richard's statement was never memorialized. It would appear from the foregoing that the State was not required to disclose the statement. Nevertheless, Jerry argues that there is an exception to this rule where the State's failure to reduce the statement to "written form amounts to an intentional tactic to prevent disclosure of relevant material to the defendant." (*People v. Szabo* (1983), 94 Ill. 2d 327, 348, citing *People v. DeStefano* (1975), 30 Ill. App. 3d 935, and *People v. Manley* (1974), 19 Ill. App. 3d 365.) A review of the cases to which Jerry cites in support of his assertion demonstrates that they are inapposite.

In *Szabo*, this court vacated defendant's convictions and remanded the case for further proceedings where it was shown that the State had deliberately destroyed "rough notes" made while conducting 20 witness interviews, totalling approximately 30 hours. (*Szabo* 94 Ill. 2d at 343, 350.) In *DeStefano*, the appellate court reversed defendant's murder conviction where a prosecutor admitted that he had ordered agents of the Illinois Bureau of Investigation to refrain from taking any written statements from defendant's alleged accomplice who had been granted

immunity from prosecution. (*DeStefano*, 30 Ill. App. 3d at 943.) Finally, in *Manley*, the appellate court upheld a trial court's ruling holding a prosecutor in contempt of court where he admitted that it was the practice of his office to refrain from reducing a witness' oral statements to writing in order to surprise the defendant at trial. *Manley*, 19 Ill. App. 3d at 369, 372.

In contrast to the cases cited above, there is no evidence in this case to demonstrate that the State acted in bad faith. Jerry asserts that bad faith is demonstrated by the State's failure to "correct erroneous information" contained in documents produced during discovery. However, he fails to point to even one document which contained this allegedly "erroneous information." We will not presume lightly bad faith on the part of the State, and the sole fact that Jerry was "surprised" by Richard's in-court identification of him as one of the perpetrators of the crimes cannot be grounds for such a finding.

Jerry next asserts that a statement Jo Ellen Pueschel's mother made from the gallery during the redirect examination of Reginald denied him a fair trial. During defense counsel's redirect examination of Reginald Mahaffey, the following colloquy took place:

"Q. Did you kill the Pueschels?

A. No, sir.

MRS. JOSEPHINE HEINRICH (From the audience): Did you kill my daughter? I'm sorry.

THE COURT: Ma'am please.

MRS. JOSEPHINE HEINRICH (From the audience):

—my grandson

THE COURT: Ma'am, please, Mrs. Heinrich.

Continue, Mr. Levin.

MR. LEVIN [counsel for defendant Reginald Mahaffey]: I want a recess now, please.

THE COURT: There is no need for it, there is no need for it.

MR. LEVIN: I have a motion then, your Honor.

MR. DECKER [counsel for defendant Jerry Mahaffey]: We also wish to join in on behalf of Jerry Mahaffey.

THE COURT: We will take your motion up after the recess.

Continue your questions.

MR. LEVIN: I have no further questions.

MR. MALATESTA: We have no further questions.

MR. DECKER: Judge, if I may briefly."

After Mr. Decker finished cross-examining Reginald, all counsel and the court recessed into chambers where counsel for both defendants made a motion for a mistrial. After hearing argument of counsel, and having the court reporter read back the record of Mrs. Heinrich's statement, the trial court denied the motion, stating:

"I heard the unfortunate occurrence and I was present. As soon as Mrs. Heinrich got up and began to yell, because that is what she did, the statement that the court reporter just read I immediately said, 'Ma'am, stop' or whatever I said. Her husband and two sons immediately jumped up and smothered her in their arms. She broke away from them and said something else, whatever it was I did not catch, but it was some type of remark. She was red in the face and obviously emotional at the time, then they led her away.

Now, it is an unfortunate circumstance in a case that has been relatively free of courtroom hystrionics. However, with all of the admonitions that I have made to the jury in the past and the admonitions that I intend to give to the jury in connection with this particular statement and knowing the quality of the jurors that were selected in this case, I believe that they can truly put aside from their deliberations the emotional statement that was made by Mrs. Heinrich

and can consider this case based on the evidence they heard from the witness stand.

I will admonish them now and I will admonish them again at the conclusion with the regular instructions. However, I do not feel that it is of such moment that it would prejudice the defendants to such an extent that it would prevent them from getting a fair and impartial trial.

Your motions for mistrial are denied."

Court then reconvened and the trial court admonished the jurors in the following manner:

"If you remember when we were first selecting you as jurors I asked you questions concerning whether or not you would be able to judge this case based solely and exclusively on the testimony you heard from this witness stand, the arguments of the lawyers and my instructions to you, and you each said that in your own way that you'd be able to do that. And you each were able to say that you would not allow sympathy or prejudice to influence your verdict but would again concentrate your deliberative efforts solely and exclusively on what you heard in this courtroom from that witness stand.

We had an incident today, you were all present here. I would ask you and instruct you now orally and we will further instruct you later on, that you do not in any way consider the incident that took place in any way in coming to your conclusions as to the guilt or innocence of either Reginald Mahaffey or Jerry Mahaffey. As best you possibly can, put that from your mind when you are deliberating on this. You said you'd be able to do that before, I have confidence that you will be able to do it. But I am again stressing that this is one of the things that you said you would be able to do and when you put your hand up and took the oath that is one of the obligations that you imposed upon yourselves, and I am sure you will be able to do that."

We find instructive this court's decision in *People v. Herbert* (1935), 361 Ill. 64. In *Herbert*, the defendant testified at trial, and was asked whether he had murdered the victim. When the defendant denied his involvement in the crime, the victim's widow shouted, "You dirty, lying thing, you! How dare you sit there and say that! You dirty liar!" This court found that the remarks did not deny defendant a fair trial, although it stated that the trial court should have admonished the jury to disregard the remarks. *Herbert*, 361 Ill. at 71-72.

Mrs. Heinrich's remarks in this case can in no way be considered as inflammatory as those at issue in *Herbert*. Mrs. Heinrich's remarks were not accusatory, but merely re-asked the question which Reginald had just answered. Furthermore, the trial court did not highlight the incident by immediately recessing court and allowing the jurors to dwell on the incident, but allowed re-cross-examination to continue. Finally, the trial court followed *Herbert*'s dictates and thoroughly admonished the jurors to ignore the incident and rely solely on the evidence when deliberating.

Jerry asserts the trial court's instruction that the jurors should ignore the remarks "[a]s best you possibly can" is a weak admonition and left the jury with the impression that the instruction was permissive rather than compulsive in nature. This argument substantially ignores the majority of the court's statement, which clearly instructed the jury that it was their duty "to judge this case based solely and exclusively on the testimony [they] heard from [the] witness stand." Based on the record before us, we cannot say Jerry was denied a fair trial.

Our conclusion that the trial court did not err in determining that the jury could properly perform its function at the guilt phase of the trial also compels us to disagree with Jerry's assertion that Mrs. Heinrich's comments entitled him to a new jury at the sentencing phase. Nevertheless, Jerry cites to a recent Supreme Court case which he contends requires us to remand the case for resentencing. (See *Turner v. Murray* (1986), 476 U.S. 28, 90 L. Ed.

2d 27, 106 S. Ct. 1683.) We disagree. In *Turner*, the Supreme Court stated that "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." (*Turner*, 476 U.S. at 35, 90 L. Ed. 2d at 35, 106 S. Ct. at 1687.) The Court went on to hold "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." (476 U.S. at 36-37, 90 L. Ed. 2d at 37, 106 S. Ct. at 1688.) *Turner* involved the role that racial bias may have in influencing a sentencing jury. Jerry asks this court to extend the holding in *Turner*, and find that Mrs. Heinrich's comments may have influenced this jury in the same way that undetected racial bias may have influenced the sentencing jury in *Turner*. We see no reason to give *Turner* such an expansive reading. Having thoroughly reviewed the record concerning Mrs. Heinrich's comments and the trial court's admonitions to the jury to disregard those comments in their deliberations, we find Jerry's contention to be without merit.

Jerry's next argument revolves around the State's failure to have Cedric Mahaffey fingerprinted or to testify at trial. Jerry asserts that some of the prosecution's statements during trial and closing argument shifted the burden of proof to him to produce Cedric Mahaffey at trial, and undermined the presumption of his innocence. When the disputed comments are placed in context, however, it becomes apparent that any error was invited.

During its closing argument, the State *never* made reference to the failure of Jerry to call Cedric Mahaffey to testify. However, in his closing argument Jerry's counsel made several references to the fact that the State had failed to call Cedric Mahaffey as a witness:

> "For you see, the burden in this instance is upon these two prosecutors. That is their job. If you feel that they have failed to present a critical witness to you, who you would have wanted to hear and see,

> that would have helped you establish in your own minds, was there a reasonable doubt in this case or was there not? Then you see, that is their burden. That is their job, the job that they are paid to do, and the job that they accepted to do when they accepted their office. If you feel that they failed in that burden, well then by your oath, your own job, your decision must be that of not guilty.
>
> * * *
>
> * * * [U]nless you were convinced beyond a reasonable doubt, unless you were convinced that the State has met their burden in this case * * * [t]hat they would call those witnesses who had information about this case, that they would call that felon, Cedric Mahaffey."

It was only after Jerry's counsel raised the issue of Cedric Mahaffey's failure to testify that the prosecutor made the following comments during rebuttal closing arguments which Jerry now cites as error on appeal:

> "There is no greater power in this nation concerning a case before a court and that man that is sitting right up there. If I walked up to this man and I said, Your Honor, I want to subpoena this witness, and if they walked up to this man and they said, Your Honor, we want to subpoena this witness; it could be President Reagan himself, the President of the United States; and do you know what, ladies and gentlemen? He must appear. He must appear.
>
> Do not—do not believe, for one minute, that if they wanted to, they could not have brought Cedric Mahaffey into this courtroom. They did not want to.
>
> MR. DECKER [counsel for defendant Jerry Mahaffey]: Objection.
>
> MR. MALATESTA: And do you know why?
>
> THE COURT: Overruled.
>
> MR. LEVIN [counsel for defendant Reginald Mahaffey]: Objection.

[MR. MALATESTA]: And if they wanted to bring in Cedric Mahaffey to contradict Sergeant Byrne, they could have done it in a second. They know exactly where he is.

MR. DECKER: Objection, your Honor.

MR. MALATESTA: They know exactly where he is.

MR. LEVIN: Objection.

THE COURT: Overruled. Overruled.

* * *

[MR. MALATESTA]: They are looking for one of you to be silly enough to believe his story, to be silly enough to not listen to what you heard on that stand, and believe his story about this mystery man that we didn't listen to for two weeks.

There's no mystery. You know exactly where he's at. They know exactly where he's at. They know exactly where he's at.

MR. DECKER: Objection once again, your Honor.

THE COURT: Overruled."

From the foregoing, it is apparent that at the very least, defense counsel was arguing that Cedric Mahaffey was privy to some exculpatory information. Pursuing this line of argument, defense counsel demanded that the State explain Cedric's failure to testify. In response to this challenge, the State reminded the jurors of the power of compulsory process, and argued that Jerry's innocence was not the only inference to be drawn from Cedric's failure to testify. Because the comments were invited, they cannot be relied upon as error on appeal. *People v. Collins* (1985), 106 Ill. 2d 237, 284.

Jerry also asserts as error the prosecutor's statement regarding the fact that Jerry also had the ability to procure Cedric Mahaffey's prints. During defense counsel's cross-examination of the State's fingerprint expert, the expert was asked whether the State's Attorney's office

could obtain Cedric Mahaffey's palm print. The State objected to the question, and stated that the defense also had the ability to obtain Cedric Mahaffey's finger and palm prints. Jerry contends that the comment had the effect of shifting the burden of proof to him to prove his innocence.

The record reveals that the trial court, at defense counsel's request, instructed the jury to disregard the comment. Moreover, the prosecutor did not dwell on the matter, and the record demonstrates the jury was properly instructed throughout the trial regarding the presumption of innocence and the State's burden of proof. On these facts, we cannot say that this isolated remark, nor any of the remarks Jerry cites as error, was a material factor in his convictions such that the outcome of the verdict would have been different. *Collins*, 106 Ill. 2d at 276.

Jerry's next contention is that the State failed to prove the *corpus delicti* of the rape. We disagree. This court has held that:

> "[I]n establishing the *corpus delicti*, there must be some evidence, apart from the confession, demonstrating that a crime occurred. * * *
>
> * * *
>
> * * * [I]f the independent evidence *tends* to prove that an offense occurred, then such evidence, if corroborative of the facts contained in the confession, may be considered along with the confession in establishing the *corpus delicti*. In such event, the independent evidence need not establish beyond a reasonable doubt that an offense did occur." (Emphasis in original.) (*People v. Willingham* (1982), 89 Ill. 2d 352, 360-61.)

In this case, the evidence shows that Jo Ellen Pueschel was found dead, lying face down on the kitchen floor, clad only in a nightgown with no undergarments. Expert testimony also showed that her vagina was "widely patent" and that the vaginal swab taken from her tested positive

for the presence of sperm. In his confession, Reginald stated that he led Mrs. Pueschel out of the bedroom in which he found her, and had vaginal intercourse with her in the living room and the kitchen. Jerry stated in his confession that Mrs. Pueschel was wearing a blue negligee. It is clear that the condition of Mrs. Pueschel's body when found and the physical evidence suggesting recent intercourse tend to prove that an offense occurred. Furthermore, these facts, when coupled with both of the defendants' statements, establish the *corpus delicti* of rape.

Jerry cites to several cases in support of his argument that the State failed to prove the *corpus delicti* of the rape: *People v. Lambert* (1984), 104 Ill. 2d 375; *People v. Thomas* (1960), 18 Ill. 2d 439; *People v. Kokoraleis* (1986), 149 Ill. App. 3d 1000; *People v. Anderson* (1974), 20 Ill. App. 3d 840. All are inapposite. Two of the cases to which Jerry cites deal not with proving the *corpus delicti* of rape, but with evidence corroborating a rape complainant's testimony. (*Thomas*, 18 Ill. 2d at 444; *Anderson*, 20 Ill. App. 3d at 849.) In *Kokoraleis* there was no evidence to corroborate defendant's confession to the crime of rape because the victim's body and clothing were badly decomposed. (*Kokoraleis*, 149 Ill. App. 3d at 1027-28.) In contrast to the lack of physical evidence in *Kokoraleis*, the evidence in this case demonstrates that the victim was found lying face down in the kitchen clad only in a nightgown, and that her vagina was widely patent. Moreover, the vaginal swab taken from her tested positive for the presence of sperm. Finally, the only evidence in *Lambert* outside of the defendant's confession tending to show that defendant had committed the crime of indecent liberties with a child was that the defendant slept in the basement while living with the victim's family, and that the victim's rectum was "pinkish and swollen" two to three weeks after he had slept in the basement defendant used as a bedroom. (*Lambert*, 104 Ill. 2d at 379-80.) In contrast to the break in the evidentiary chain occasioned by the two to three week delay in *Lambert*, the evidence of rape in this case was discovered within a few hours after the

crime occurred. We therefore conclude that the State has established the *corpus delicti* of the rape.

In a related contention, Jerry asserts that the case must be remanded for resentencing. He contends that because the State failed to prove the *corpus delicti* of the rape, a factor in aggravation has been shown not to exist. Given our conclusion that the State did prove the *corpus delicti* of the rape, this contention must be deemed to be without merit.

Jerry next contends that the prosecutor's statements during rebuttal argument at the death phase denied him a fair sentencing hearing. The record reveals however that the statements were merely a proper response to statements defense counsel made in closing argument.

During closing argument at the death phase, Jerry's counsel told the jury to not allow the prosecutors to force them to "become an instrument of violence," and argued that there was "no easy way to determine how to kill someone and when we [should kill someone.]" Counsel added, "I am certainly glad of one thing[,] I am glad that is your job and not mine." Counsel continued this line of argument, stating that additional violence in the form of a death sentence for Jerry would not bring the victims back to life, and that they should not err "on the side of violence," but "on the side of mercy."

In response to these remarks, the State argued:

> "You are not the instrument of violence, you are a group of people from all sections of our community. You are a group of people who came together a little less than a month ago and had the opportunity to participate first-hand in what I believe to be the most important part of our lives. And that is the insurance that justice; not a word[,] a reality, that justice is part of our criminal justice system, that it is real.
>
> In your actions, in what we are asking you to do, and that is to follow the law, in your following of

that law, in that law that must be meaningful, you are not killing anyone, you are not creating a violent society, you are carrying out the law and making it meaningful. You are telling the real people that are violent in our society that we cannot tolerate it any longer, we will not tolerate it any longer.

All of this time, all of the sacrifice that each and every one of you has given to us cannot stop now, it can't. In order for that law to be meaningful you must have the courage to carry it out and courage it takes. There is no mistake about what it takes to insure that there is order in our society.

* * *

You, by your decision in following the law, are not putting anyone to death. You are carrying out the will of the people and you are following the law that is necessary for our time. We have tried what Mr. Decker asked of you, to get to the cause. We have tried to rehabilitate, we have tried it in this case on these two men and it just doesn't work. Not only did it not work for them but it shows and creates and allows a total disregard and disrespect for the laws that govern us.

* * *

Do not feel guilty for being courageous enough to participate in the criminal justice system. Do not feel guilty that collectively you have come together to insure justice.

You as an individual (indicating), and you as an individual (indicating), are not killing Jerry and Reginald Mahaffey as they suggested. You, as a jury, as a representation of our community, are carrying out the law."

It is clear that when the prosecutor's comments are read in context, he was merely denying that the jurors were instruments of violence, and focusing on their duty to follow and enforce the law. The prosecutor's comments did not seek "to minimize the jury's sense of responsibility

for determining the appropriateness of death." (*Caldwell v. Mississippi* (1985), 472 U.S. 320, 341, 86 L. Ed. 2d 231, 247, 105 S. Ct. 2633, 2646.) Quite the contrary, a complete review of the record indicates that the arguments of both parties insured that the "jury recognize[d] the gravity of its task and proceed[ed] with the appropriate awareness of its 'truly awesome responsibility.' " *Caldwell*, 472 U.S. at 341, 86 L. Ed. 2d at 247, 105 S.Ct. at 2646.

Jerry also contends that the prosecutor erred in stating that "[w]hen they tell you that they will spend the rest of their lives in prison, there's no guarantee." The evidence introduced at the sentencing hearing showed that Jerry escaped from Cook County jail while awaiting trial. When asked at the sentencing hearing whether he would attempt to escape again, he replied, "I don't know." From the foregoing it can be seen that the prosecutor's comments were not improper, as they were clearly based on evidence adduced at the sentencing hearing. See *People v. Johnson* (1986), 114 Ill. 2d 170, 198.

Jerry also asserts that the prosecutor erroneously "belittled" a recognized factor in mitigation, namely, that he "grew up in a bad area." The record reveals that defendant failed to object to this statement, and failed to include the purported error in his post-trial motion. The issue is therefore waived through procedural default. *People v. Gacho* (1988), 122 Ill. 2d 221, 239; *People v. Holman* (1984), 103 Ill. 2d 133, 181-82 (Ryan, C.J., concurring in part and dissenting in part).

Jerry also contends that the prosecutor's statement that a sentence of life imprisonment would have the effect of "letting [the defendants] go," "created the unacceptable risk that the death penalty was imposed on the basis of some extraneous fear of rewarding the defendants." The record reveals however that the prosecutor was merely arguing that death was a reasonable form of punishment in this case. See *People v. Albanese* (1984), 102 Ill. 2d 54, 81.

Jerry next asserts that the trial court erred in refusing to instruct the jury that if it failed to sentence him to death, the court would sentence him to a term of natural life imprisonment. This court has recently held that:

> "An instruction in the case of multiple murders should state that if the jury finds mitigating factors sufficient to preclude imposition of the death penalty, the defendant will be sentenced to natural life imprisonment, and no person serving a term of natural life imprisonment can be paroled or released, except through executive clemency." (*People v. Gacho* (1988), 122 Ill. 2d 221, 262.)

The new rule announced in *Gacho* was held to be prospective only (*Gacho*, 122 Ill. 2d at 263); therefore, the trial court properly instructed the jury in accordance with existing law (see *People v. Albanese* (1984), 102 Ill. 2d 54, 81; *People v. Stewart* (1984), 105 Ill. 2d 22, 71). Jerry argues that the Supreme Court's recent decision in *Griffith v. Kentucky* (1987), 479 U.S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708, which held that decisions announcing new constitutional rules of criminal procedure are "to be applied retroactively to all cases, state or federal, pending on direct review or not yet final," requires us to reexamine our holding in *Gacho*. This issue was recently decided adversely to Jerry in *People v. Harris* (1988), 123 Ill. 2d 113, where we declined to reconsider our holding regarding the retroactivity of new rules announced before the Supreme Court's decision in *Griffith*. *Harris*, 123 Ill. 2d at 130.

Jerry next contends that the trial court erred in holding a joint death penalty hearing. Without citation to any part of the record or any supporting authority, Jerry asserts "that jurors find it impossible to rationally differentiate imposing the death sentence on one defendant while sparing the second defendant and, so will inflict it on both of them."

Jerry failed to include this issue in his post-trial motion, thereby waiving the issue through procedural default.

(*People v. Gacho* (1988), 122 Ill. 2d 221, 239; *People v. Holman* (1984), 103 Ill. 2d 133, 181-82 (Ryan, C.J., concurring in part and dissenting in part).) Moreover, his failure to cite any authority or to any section of the record in support of his argument also results in waiver of the issue pursuant to Supreme Court Rule 341 (107 Ill. 2d R. 341). Given these deficiencies, we must deem the issue to be without merit.

Jerry's next contention is that his death sentence is excessive given his light criminal background and "deep family support." We begin by noting that when reviewing a sentence of death, this court will make a separate review of the record but will not overturn a trial court's finding when that finding is amply supported by the evidence. *People v. Brownell* (1980), 79 Ill. 2d 508, 539-40.

The evidence adduced at the sentencing hearing reveals that Jerry has a record of criminal conduct dating back to 1979. He has three convictions for robbery, two for retail theft and one for theft. We find significant the fact that his criminal conduct continued even after his arrest for these crimes, as evidenced by the fact that he robbed a prison guard and escaped from prison while awaiting trial. When Jerry's criminal background, and his conduct while in prison, is coupled with the crimes of which he has presently been convicted, we find no reason to overturn the jury's finding that there are no mitigating factors present to preclude imposition of the death penalty.

Jerry next raises several claims challenging the constitutionality of the Illinois death penalty statute, all of which have been resolved against him. The statutory grant of discretion to the prosecutor of whether to seek the death penalty in a particular case is valid and constitutional. (*People v. Evans* (1988), 125 Ill. 2d 50, 98; *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, 534-43.) The State does not have to prove the absence of mitigating factors beyond a reasonable doubt. (*People v. Johnson* (1987), 119 Ill. 2d 119, 151; *People v. Kubat* (1983), 94 Ill. 2d 437, 504.) The death penalty statute does not place an imper-

missible burden of proof upon the defendant to establish mitigating factors. (*People v. Orange* (1988), 121 Ill. 2d 364, 390.) Moreover, the death penalty statute does not deprive the defendant of adequate appellate review. (*People v. King* (1986), 109 Ill. 2d 514, 551; *People v. Gaines* (1981), 88 Ill. 2d 342, 383-84.) We have also determined that sympathy should not be considered as a mitigating factor (*People v. Crews* (1988), 122 Ill. 2d 266, 291-93), and we have found no merit to the statistical argument that killers of whites are more likely to receive the death sentence than are killers of blacks (*People v. Davis* (1987), 119 Ill. 2d 61, 64-66; *People v. Spreitzer* (1988), 123 Ill. 2d 1, 45-46).

For the reasons set forth above, we reverse defendant Reginald Mahaffey's convictions and remand the case for a new trial. We affirm defendant Jerry Mahaffey's convictions and his sentence of death. We hereby direct the clerk to enter an order fixing the date of Tuesday, September 12, 1989, as the date on which the sentence of death entered by the circuit court of Cook County shall be carried out. Defendant Jerry Mahaffey shall be executed by lethal injection in the manner provided by section 119-5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1987, ch. 38, par. 119-5.) A certified copy of this mandate shall be transmitted by the clerk of this court to the Director of Corrections, the warden of Stateville Correctional Center, and to the warden of the institution where defendant Jerry Mahaffey is confined.

No. 61821 — Affirmed.
No. 61822 — Reversed and remanded.

JUSTICE MILLER, concurring in part and dissenting in part:

I join that part of the court's opinion with respect to cause No. 61821, which affirms the convictions and death sentence of defendant Jerry Mahaffey. I do not agree with the court, however, that a new trial is required in cause No. 61822, involving defendant Reginald Mahaffey, and therefore I dissent from that portion of the majority opinion.

The defendants were tried jointly before a jury on charges stemming from the murder of Dean and Jo Ellen Pueschel, the sexual assault of Mrs. Pueschel, and the attempted murder of the Pueschel's 11-year-old son, Richard. At trial the State presented the identification testimony of Richard Pueschel as well as evidence establishing that certain items of property belonging to the Pueschels were discovered in the defendants' possession when they were arrested in connection with the offenses here. The State also presented, as part of its case in chief against each defendant, that defendant's confession to the crimes; the jurors were instructed, both when the confessions were published and later, at the outset of deliberations, not to rely on the confession of one defendant in determining the guilt or innocence of the other. At trial the defendants challenged the accuracy of their confessions. Reginald Mahaffey testified, and he denied any involvement in the offenses and claimed that his confession was the product of coercion. Jerry Mahaffey, who did not testify, presented a similar defense through the testimony of other witnesses, disputing the strength of the State's evidence and attempting to show that his own confession was also coerced.

Before trial the defendants had moved for a severance on the grounds that the State's intended use of the confessions would, under *Bruton v. United States* (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620, deny them their right to confront witnesses. The trial judge denied the motion, relying on the plurality opinion in *Parker v. Randolph* (1979), 442 U.S. 62, 60 L. Ed. 2d 713, 99 S.

Ct. 2132, which held that *Bruton* error does not occur if a defendant's own confession, introduced into evidence, "interlocks" with, or is corroborated by, the confession of the nontestifying codefendant and the jury receives instructions correctly limiting the use of the evidence.

The Supreme Court has since rejected *Parker*, however, in *Cruz v. New York* (1987), 481 U.S. 186, 95 L. Ed. 2d 162, 107 S. Ct. 1714. Because Jerry Mahaffey did not testify at trial, codefendant Reginald Mahaffey claims that, under *Bruton* and *Cruz*, he was denied his confrontation right by the introduction of Jerry's incriminating confession. The State now contends that there were sufficient indicia of reliability to have warranted substantive evidentiary use of Jerry Mahaffey's confession against Reginald Mahaffey and, alternatively, that the *Bruton* error was harmless. For the reasons set out below, I would conclude that what error occurred was indeed harmless and does not necessitate a new trial.

Bruton errors, though constitutional in nature, do not mechanically compel reversal (see *Cruz*, 481 U.S. at 193-94, 95 L. Ed. 2d at 172, 107 S. Ct. at 1719), and a conviction may be upheld if the reviewing court is able to determine that the constitutional violation was harmless beyond a reasonable doubt (see *Chapman v. California* (1967), 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824). This requires consideration of the strength of the competent evidence of the defendant's guilt and the probable effect on the jury of the nontestifying codefendant's confession. See *Brown v. United States* (1973), 411 U.S. 223, 36 L. Ed. 2d 208, 93 S. Ct. 1565; *Schneble v. Florida* (1972), 405 U.S. 427, 31 L. Ed. 2d 340, 92 S. Ct. 1056; *Harrington v. California* (1969), 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726.

The State presented substantial evidence establishing Reginald Mahaffey's guilt of the offenses charged here. At trial Richard Pueschel, who survived the brutal attack, identified the defendants as the family's assailants. The State also presented Reginald Mahaffey's confession to the

crimes. In his statement, Reginald Mahaffey described the brothers' entry into the Pueschels' apartment, the attempt to strangle the Pueschels' son, Richard, the murder of Mr. Pueschel, the sexual assault and murder of Mrs. Pueschel, the removal of a number of possessions from the apartment, and the brothers' escape in the victims' car. Reginald Mahaffey's account of the offenses was confirmed by investigating officers, whose analysis of the crime scene verified the details given in the confession.

Numerous items identified at trial as belonging to the victims were found in Reginald Mahaffey's possession at the time of his arrest, four days after the offenses occurred. In Reginald Mahaffey's room police officers discovered Mr. Pueschel's .357 Magnum revolver and Remington shotgun; the handgun bore traces of blood consistent with Mrs. Pueschel's blood type. The officers also found a stereo dust cover containing 24 pieces of jewelry belonging to the Pueschels, including several bracelets bearing the victims' names. Reginald Mahaffey was wearing Mr. Pueschel's ring, and he had in his pocket Mr. Pueschel's watch and crucifix. At trial Reginald testified that he had purchased the guns and other items from another man; there was no evidence to corroborate that explanation. Police officers found the Pueschels' television set, video cassette recorder, and videotapes in Jerry Mahaffey's own apartment.

In view of the substantial evidence of Reginald Mahaffey's guilt, I do not believe that it can be said that he was prejudiced by the State's use at the joint trial of his brother's confession, which, like his own, implicated both defendants. In this regard, it may be noted that the Mahaffeys' defenses to the charges were complementary rather than antagonistic. Their shared theory of defense claimed that they did not take part in the attack on the Pueschels and that their confessions to those crimes were involuntary. If Jerry Mahaffey had taken the witness stand at trial, he would have denied involvement in the offenses and would have asserted that his inculpatory

statements to the police were coerced. But other testimony on those claims was introduced into evidence on Jerry Mahaffey's behalf. In essence, Jerry's failure to testify cost Reginald Mahaffey only the opportunity to present further testimony in support of the defense contentions.

Assuming that a *Bruton* error occurred in this case, I would hold that the violation was harmless beyond a reasonable doubt, and I would therefore consider in the present appeal the remaining arguments raised by defendant Reginald Mahaffey in cause No. 61822.

JUSTICE RYAN joins in the partial concurrence and partial dissent.

APPENDIX B

RE: INVESTIGATION (DEATH OF DEAN PUESCHEL AND JO ELLEN PUESCHEL AND BEATING OF RICHARD SOKOLOWSKI)

STATEMENT
OF
REGINALD MAHAFFEY,

taken in the Conference Room of the Chicago Police Department, Area 2 Violent Crimes Headquarters, 727 East 111th. Street, in the City of Chicago, County of Cook, State of Illinois, on Friday, September 2nd, 1983, at the hour of 11:45 o'clock a.m.

PRESENT: MR. IRVING MILLER, SUPERVISOR, ASSISTANT STATE'S ATTORNEY, FELONY REVIEW UNIT.

MR. GEORGE VELCICH, ASSISTANT STATE'S ATTORNEY, FELONY REVIEW UNIT.

DETECTIVE JOHN YUCAITIS, #7498, AREA 2 VIOLENT CRIMES UNIT, CHICAGO POLICE DEPARTMENT.

REPORTED BY: MICHAEL F. HARTNETT, BOOK NUMBER 8309-1.

MR. MILLER: Let the record reflect that we are located in the Conference Room at Area 2 Violent Crimes Police Headquarters. The date is September 2nd, 1983. The time is now 11:45 a.m.

Present in the room with me are Assistant State's Attorney, George Velcich of Felony Review; Detective John

Yucaitis, Star Number 7498 of Area 2 Violent Crimes; the court reporter, Mike Hartnett; Mr. Reginald MaHaffey the man who is giving us this statement; and myself, Assistant State's Attorney, Irving Miller.

Reginald, you and I had a conversation earlier today about what occurred, is that right?

REGINALD MAHAFFEY: A Yes.

BY MR. MILLER:

Q And we took an oral statement regarding an incident which occurred on the 29th of August, 1983 at 2519 Jerome in Chicago, Cook County, Illinois, is that right?

A Yes.

Q And that was in regards to the beating of three people, namely Dean Pueschel, Jo Ellen Pueschel and Richard Sokolowski, the child, is that right? We were talking about that earlier, is that right?

A That's what we was talking about.

Q And before we had that conversation, I gave you your rights, didn't I?

A Yes, you did.

Q Okay. I am going to give you your rights all over again right now. Do you understand that you have a right to remain silent?

A Yes.

Q Do you understand that anything you say can be used against you in a court of law?

A Yes.

Q Do you understand that you have a right to have a lawyer present with you before and while and during any questioning?

A Yes.

Q Do you understand that if you cannot afford to hire a lawyer, one will be appointed by the court to represent you before any questioning, if you wish one?

A Yes.

Q An attorney would be appointed free of charge for you, do you understand that?

A Yes.

Q Are those the same rights that I read to you before earlier today?

A Yes.

Q Now, earlier you indicated to me that you understood your rights and would be willing to give a statement. Do you wish to give a statement right now?

A Yes.

Q Let me call your attention to August 29th, 1983. Did you have a conversation with one of your brothers about going to the north side?

A Yes.

Q Which brother did you talk to?

A Jerry Mahaffey.

Q What did you plan to do up on the north side?

A Burglarize a clothing store.

Q Was there any particular clothing store you planned to burglarize?

A I really—I had a choice between a few.

Q How were you to decide which one you were going to burglarize?

A By the traffic run.

Q Now, did you eventually go up to the north side with your brother Jerry?

A Yes.

Q And how did you get to the north side?

A I got to the north side through transportation of a third party.

Q And who was that third party?

A I don't know his full name. But, I know him as LeRoy.

Q How did you get to the north side? What vehicle did you take?

A We had a van.

Q And whose van was that?

A LeRoy's van.

Q What color was that van?

A Brown, like a tan brown.

Q Did the three of you go up to the north side?

A Yes.

Q Did you go up in LeRoy's van?
A Yes, we did.
Q Where did you go once you got up to the north side?
A He took me on Howard.
Q Howard near Western?
A Right off Western. About three blocks from Western. [*east*]*
Q What were you going to do when you got to that location?
A I was going to stake out a clothing store and burglarize it.
Q Did you find a clothing store that you were going to burglarize?
A I found the one I wanted to burglarize, but the one on Howard about three blocks from Western, it wasn't fit.
Q Why wasn't it fit?
A Too much traffic.
Q Okay. About what time in the morning was this on the 29th of August 1983 that you went up there to burglarize this clothing store?
A We left around about 2:30.
Q In the morning?
A Uh-huh.
Q You have to answer yes or no.
A Yes.
Q Now, after you discovered that particular clothing store was not fit to burglarize, where did you go?
A We went back to Western and what is the street.
Q You told me earlier it was Howard Street, is that right?
A Western and Howard by the mall.
Q And where did you park the van?
A In the parking lot of the mall on Howard and Western.
Q And who was with you at this time?
A My brother Jerry.

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* Italicized words or phrases in brackets indicate handwritten corrections or insertions made by Reginald Mahaffey on the original typewritten statement.

Q Had LeRoy left already?

A Yeah. He had another vehicle which I didn't know about that was following us so he could get back.

Q He left prior to you and your brother getting to Howard and Western in the mall?

A Yeah.

Q After you parked the car—Excuse me. After you parked the van at the mall on Howard and Western, what did you do?

A I went to check out this clothing store which was "Off The Rax". It was mostly—I don't know—It was an all-ladies clothing store because a previous date at the store I got all lady designer jeans, sweaters, jackets and shit like that.

Q You were going to burglarize this place because you were successful in burglarizing this store before, is that right?

A True.

Q What happened when you started to take out that clothing store?

A I went to check it out. I went to look at what was around, who was around and then it looked pretty neat. I went to pull the van around to the front of the store and put it right in front of the store. Then when I went to stick the keys in the ignition the van went completely dead.

Q Was it the battery?

A It was the battery.

Q What did you do then after the van wouldn't start?

A I went to check the hood to see if I can get to the battery and put the cables—check the cables and everything. Then I noticed it was a lock on the hood to keep anybody from checking the battery.

Q You left the van at this point?

A I left the van at this point.

Q Where did you go?

A Locked it up and we proceeded to—Let's see.

Q Did you go down an alley then?

A We went through the parking lot. We came to some apartment buildings.

Q Did you notice anything in particular about one of the apartments?

A Yes. One of the apartments had a window open. I proceeded to take out the [*screen*] and my brother Jerry MaHaffey went in first and I followed him. I was right on his back.

Q Which room did you enter first?

A We hit the bathroom first.

Q Go ahead. What happened then?

A Then we looked and we noticed that it was a person in the room on the right-hand side. From there we went to the kitchen. Opened the refrigerator and saw some ready-made Kool-Aid, whatever.

Q Was it in a pitcher?

A It was in a pitcher.

Q What did you discover after you had the ready-made drink?

A We looked on the table and there was a wallet. We got a few dollars out of the wallet. It was—possibly there was in there about $11.

Q Who took that money?

A I picked up the wallet and Jerry opened it and he got the money out of the wallet.

Q Did you also find any knives in the kitchen at that time?

A Yes. At that time we—I picked up a butcher knife about an inch wide at the bottom of it. The blade was an inch wide at the bottom of the blade. It was about five inches long.

Q When you left the kitchen where did you and your brother Jerry go then?

A We went into the kid's room. We thought that was the adult at that time. At the time the other door was shut on the left-hand side.

Q All right.

A Coming from the bathroom.

Q What happened when you went into the kid's room?

A We went into the kid's room.

Q Was he sleeping?

A Yes. He was sleeping. My brother noticed it was a kid. He said, man, it's a boy, you know.

Q What did you do then when you saw the boy sleeping?

A I don't know what step it came, whether he said that was a boy or rather it was after you know, after we had proceeded.

Q What did you do?

A I got on him, on his back, and put a pillow over his head telling him everything is going to be all right, just don't make no noise.

Q Was he lying face down or face up?

A He was on his stomach.

Q By getting on him, did you get on his back?

A Yes, on his back. I held the pillow on his head. Then I proceeded to choke him to try to put him to sleep and then—

Q What was your brother doing then?

A My brother—he was—he was holding the pillow. [*and towel*] He was trying to hold his mouth with the pillow.

Q What was the boy doing when you had the pillow over his head?

A He was trying, you know, he was trying to call for help, something like that.

Q Was he kicking also?

A Yes, he was kicking.

Q Now, when this was going on did you tell your brother to do anything to the boy?

A When the boy—after we struggled with the boy for about possibly four minutes, I told my brother to stab him.

Q All right.

A Then my brother he proceeded—I don't know how many times he stabbed him.

Q So, your brother stabbed the boy after you told him to stab him?

A Yes.

Q Now, did you find any objects in the room after your brother stabbed the boy?

A It was a basket of bats.

Q A basket of bats?
A A basket of bats. My brother—this came before the stabbing. My brother got a bat and hit him and tried to put him unconscious.
Q Where did he hit him at?
A Over the head.
Q How many times?
A A couple I guess.
Q What happened then?
A Then, I don't know. I don't know. I really can't be sure. I can't be sure if he hit him first or stabbed him first.
Q Did you pick up a bat at all?
A When I left the room I picked up a bat because there was two other victims in the other room that we realized—we thought they was ladies.
Q Why did you think they were ladies?
A Because the long hair, you know.
Q Now, when you picked up the bat, did you go into the other room where the other two victims were?
A Yeah. We went into the other rooms. My brother went on the rightside of the bed. I went on the leftside.
Q Which side were you on in regards to where the man was in the bed?
A I was on the leftside.
Q Where the woman was?
A Where the woman was.
Q Did you have anything in your hand?
A Yes. I had a bat.
Q What about your brother? Did he have anything in his hand?
A My brother also had a bat.
Q What did you do when you went into the room each holding a bat?
A I told him, hey, most likely if it was a kid in the other room, most likely this was a couple in this room.
Q When you and your brother were standing on opposite sides of the bed with bats in your hands, what did you do?
A We both hit him at that time. [*on his head*]

Q That would be the man that was lying on the bed?
A That was the man.
Q Was he sleeping at the time?
A Yes.
Q Was he lying on his stomach or his back?
A I wasn't sure.
Q Did you both use bats when you hit him at the same time?
A Yes.
Q What happened then?
A Then the lady woke up and my brother was still hitting the man. I told the lady just be quiet, you know. She would be all right.
Q How many more times did your brother hit the man?
A I wasn't counting. It was a few times.
Q With the bat?
A With the bat.
Q You said the lady woke up at that time. What did you do with her?
A I took her in the kitchen and then we proceeded to have sex. I told her I wanted to have sex with her.
Q Did you have sexual intercourse with her?
A Yes.
Q Was that in the kitchen?
A Yes.
Q Did you then take her into another room?
A Yes. We walked into the living room.
Q What happened in the living room?
A We finished—I finished having sex over the arm of the couch.
Q Was she face down on the couch?
A Yes.
Q And you were having sexual intercourse with her from the behind, is that correct?
A From behind.
Q In her vagina, is that correct?
A Yes.
Q What happened as you were doing that?
A As I was doing that my brother came out. He had—while I was having sex he was still in there with the man. He came out with a pistol.

Q What kind of pistol was it?

A .357 Magnum. And then he told me, man, this mother fucker had a big pistol. Now, that is not the precise words that he said and I looked at it.

Q What did you do?

A Then I left. I asked the lady, where is the other pistols. She said what other pistols. I said listen, bitch, somebody told us you got a lot of pistols. Then I went in the room and seen the man lying on the floor on the right-hand side of the bed.

Q Face up or face down?

A Face up. Then I looked in the jewelry box on the dresser. I got a few chains, a few rings, earrings and then I went over to the chest of drawers which was on the leftside of the bed. The leftside top of the bed, not at the top but at the end on the wall.

Q All right. What did you do then?

A I looked in a few drawers and I got a tee shirt out and put it on.

Q Now, did you go back into the other room after you took these items?

A Yes. I went in the other room and I seen my brother having sex with the lady.

Q How was he having sex with her?

A He was having sex with her in the mouth.

Q After he had sex with her in the mouth, did he have sex with her in the vagina too?

A I don't know.

Q What was she wearing?

A She was wearing something like a nightgown.

Q What was the man wearing?

A He was wearing shorts, something like gym shorts.

Q Now, did you have a conversation with the woman at this time?

A When I came out of the room she told me briefly—when I was out there I was telling her everything is going to be all right if she would cooperate and stuff like that and she kind of believed me, you know. When I came out of the room, she was telling me my brother was being rough with her and I told her, you know, just go along because she really ain't got no choice.

Q What happened then?

A Then afterwards, I started thinking about how we are going to get away. I asked the lady where is the car keys like I knew there was a car. And then she told me the keys was up on the table.

Q All right.

A Then I left and my brother got the keys. My brother, he got the wrong keys. He got her mother's keys, car keys and then she pointed out her car keys.

Q Then what happened?

A And she gave me the keys belonging to this car in the picture in front of me here.

Q I am going to show you this picture which I will mark as People's Exhibit #1. Is this a picture of the car that you eventually walked out to?

A That is the car.

Q Now, did you have a conversation with this woman about the car?

A Yes. She told me it had an alarm on the car and I told her well, you know, if anything went wrong it would be just as bad for her as it might be for me.

Q Did she go out to the car?

A Yes. She put on a coat.

Q What coat?

A She put on a brown trench coat and I took her out to the car. She opened the door and took the alarm off from up under the steering wheel. Then I took her back in the house and gave my brother the pistol. I packed a few distinguished items like the t.v., the machine tape player and the arcade game and I got the case of tapes that go to the machine.

Q Did you put these items in a box?

A I put them in a box also with some jewelry, a rifle, a shotgun and the .357 Magnum.

Q I am going to show you some items here we have in front of us. This shotgun which I will mark as Exhibit 2. Is that the shotgun that you took out of the house?

A It looks like it. That's the one.

Q Does that look like the shotgun you took from the man and woman's house at 2519 Jerome?

A Yes.

Q There is a box here with a large number of tapes in it. Is that the box of tapes you took out of the house?

A Yes.

Q I will mark that as Exhibit 3. I will show you an arcade type game with a couple of handles. Is that the arcade game that you were talking about that you took from the man and woman's house?

A Yes.

Q I will mark that Exhibit 4. I am going to show you a video recorder, a Zenith recorder sitting on this table. Is this the video recorder that you are referring to that you took out of the house?

A That's the recorder.

Q I will mark that Exhibit 5. For the record it is Serial #155175 on the back. Do you recognize this small t.v., on this table?

A Yes.

Q Was that also taken from the house that night?

A Yes.

Q I will mark this Exhibit 6. It is a Panosonic AC/DC battery type marked on the front. I will mark this Exhibit 6 on the side. Now, you loaded all the items in a box and took them out to the car, is that correct?

A Correct.

Q There were some other items that were taken out that we don't have.

A Yes. A .357 Magnum and some jewelry which is here, right.

Q Some of the jewelry is here I will show you that also. But you did take out some jewelry?

A Yes. The jewelry was in my pocket.

Q Now, what about the other rifle?

A We took out one shotgun, one .357 Magnum and one rifle.

Q Did you take out those items by yourself?

A Yes. I took everything out to the car by myself after the lady had turned off the alarm. She showed me how.

Q Did you also take some bullets and cartridges?

A Yeah, we got a box of 30/30 shells and 2 boxes of 12 gauge shells, a box of .38 Special and a box of .357 Mags.

Q I am going to show you a couple of boxes of shells we got here. On the front it is marked 2 and three-quarter Magnum. Did you take this box out of the house?

A Yes.

Q I am going to mark this Exhibit 7. There is a smaller box marked Sears one-ten grade hollow softpoint cartridges. Are those also out of the house that you took?

A Yes.

Q I will mark that Exhibit 8. What happened when you got back in the house?

A When I got back in the house after I loaded the merchandise in the car I was ready to go. I had—I got the pistol. I had the .357 and I hit the lady in the head. I told her lay down and she was saying something about I was—I told her lay down and her son mumbled mom, lay down, just lay down, mom. Something like that.

Q Did she lay down after her son told her to lay down?

A She was trying to say something.

Q Was that when you hit her in the head with the pistol?

A That's when I hit her a couple of times on the head with the pistol.

Q Was her son next to her when you did that?

A Right next to her and then I proceeded to leave out of the house with the magnum.

Q Let me ask you this: Did you have any conversation with your brother before you left out of the house again?

A I had when I left out of the house. I had a conversation previous to that when I left out of the house. Before I left out of the house the last time, you know, I was telling the lady she was going to be all right. You know, I was telling her this talking to her like I am talking to you now. You know, she kind of believed me and that. My brother told me, hey, man, we have to kill this bitch too.

Q What did you say?

A Man, I whispered, I know, man, don't make her panic, you know.

Q Was that before you hit her in the head with the gun?

A That was before I hit her with the gun.

Q Before you left did you see your brother do anything to the boy and his mother?

A No. On the way out the door I heard solid hits.

Q Solid hits?

A Yeah.

Q Of what?

A [*The sounds*] told me he was finishing the lady and her son off with the bats, you know. That's the thought I had. I didn't know for sure, I only thought that. One person was stabbed and that was the little boy which I told him to stab.

Q Did you go out to the car at this time?

A Yes. I went out to the car and started it up.

Q Did you wait for your brother?

A I waited on him. He was there in about four minutes.

Q When your brother came out to the car, who was driving the car?

A I was driving the car.

Q And the car we are referring to is the one that the woman whose keys you took came out and unlocked the alarm, the one in this photograph which is marked as People's Exhibit #1, is that right?

A Right.

Q The one I am showing you again?

A Yes.

Q Now, when you both got in the car where did you go to?

A We both got in the car. I backed the car up and then put it in drive and went and headed on Western all the way to the Congress and caught the expressway on Western and Congress—Homan and Congress, Harrison and Congress by the El.

Q Where did you go?

A We went to 3534 West 13th Place which is where I stayed at the time.

Q What occurred there? What did you do?

A I proceeded to load the goods into the house.

Q When you were loading the goods you are talking about into the house from the car, was that all of the merchandise you had taken out of the house at 2519 Jerome, is that right?

A That's what I'm saying.

Q What did you do then with the car?

A Then we loaded everything in the house. I took the jewelry I had in my pocket which my brother did not know about and put it in something like an ice dish an ice holder. I put all that in there and then we put—I told my brother that we got to get rid of the car and we went in the Projects at 2245 [*Lake*] back in the lot and put the car there and left the car in the back lot on the curb halfway on the curb and halfway off the curb. We were hoping that somebody else would rip off the car where they would discover fingerprints I may have left that would be no good.

Q And what did you do when you left the car there?

A I threw my shirt. I had a shirt which I was using to wipe the windshield because I didn't know how to get the fog off the windshield. I didn't know how to make the windshield wipers go on.

Q Did you try to wipe off your fingerprints with the tee shirt?

A Yes.

Q With the shirt?

A Yes.

Q Did you take the bus home from there?

A Yes. We left the car in the projects in the parking lot. We took the Western Bus to Roosevelt and took the Roosevelt Bus to St. Louis.

Q And you went back to your house, is that right?

A Back to 3534 West 13th.

Q Let me ask you this: Last Tuesday, did you and your brother split up some of the proceeds?

A Last Tuesday, me and my brother, we moved some of the proceeds to one of my other brother's house.

Q What did you keep?

A I kept the .357 Magnum, the shotgun and the jewelry, a few choice pieces of jewelry.

Q What did your brother take?

A My brother took the rifle and the Zenith tape player and the tapes. I took the arcade game over to another brother's house and I took the small, portable t.v. over there later that evening, that night.

Q Now at the time you were arrested, the police found certain items in your room, is that right?

A Yes.

Q They discovered the .357 Magnum, is that right?

A I told them where the .357 was.

Q What about this shotgun. Was that discovered in your room?

A They discovered that in the room in the closet on top of the shelf.

Q They also found jewelry in your apartment?

A In the room on top of the shelf.

Q I am going to show you some other jewelry. When you were brought into the police station today, did you have some jewelry on your person?

A I had it on my person. I gave it to the Detective and told him, hey, this belongs with that too.

Q Where was the jewelry on your person when you came into the police station today?

A It was a ring on my finger, cross and gold chain in my pocket. I had the watch in my pocket.

Q There is a ring in front of you. Is that the ring you gave to the Detective?

A That's the ring.

Q Okay. I am going to mark that Exhibit 9. I am going to show you a gold cross, is this the cross you gave to the Detective when you came into the police station?

A Yes.

Q I am going to mark that Exhibit 10. And a gold watch. I have a Seiko gold watch. Do you recognize this watch?

A That's the one I had on my person.

Q And you handed that to the Detective when you came into the police station?

A Right.

Q I am going to mark that Exhibit 11. I am going to show you a photograph which on the back is marked Exhibit 12. This is a photograph of three people. Do you recognize those three people in that picture?

A Yes, I recognize those people.

Q Who are those people in this photograph?

A Those are my victims.

Q You recognize all three of them?

A No. I just recognize the man and woman.

Q That is the man whose house you broke into on August 29, 1983 at 2519 Jerome, is that right?

A Right.

Q You have been in the police station for a couple of hours. Have the police treated you okay?

A Yes.

Q Do you have any complaints about the way the police treated you?

A No.

Q Have the police given you coffee and something to eat?

A Yes.

Q Do you have any complaints about the way George or myself have treated you?

A No.

Q And nobody has made any threats or promises to you?

A No promises have been made. [*or threats either*]

MR. MILLER: Let the record reflect, that it is now 12:15 p.m., on September 2nd, 1983, and this conclude[s] the statement of Reginald MaHaffey.

/s/ REGINALD MAHAFFEY

WITNESSES TO SIGNATURE: 3:30 PM

/s/ ASA IRVING MILLER /s/ JOHN A. YUCAITIS #7498

/s/ ASA GEORGE VELCICH

APPENDIX C

RE: INVESTIGATION (DEATH OF DEAN PUESCHEL AND JO ELLEN PUESCHEL AND BEATING OF RICHARD SOKOLOWSKI)

STATEMENT
OF
JERRY MAHAFFEY,

taken in the Conference Room, of the Chicago Police Department, Area 2, Violent Crimes Headquarters, 727 East 111th Street, Chicago, Cook County, Illinois, on Friday, September 2, 1983, at 1:00 o'clock p.m.

PRESENT: Mr. Irving Miller,
Assistant State's Attorney.

Mr. George Velcich,
Assistant State's Attorney.

Det. Frank Kajari, #12642,
Area 6, Violent Crimes

Reported by Edward Stabrawa,
Book No. 8309-2.

MR. MILLER: Let the record reflect that it's September 2nd, 1983. We are in a Conference Room at Area 2, Violent Crimes.

Present in the room are Detective Frank Kajari of Area 6, Violent Crimes; Assistant State's Attorney George Velcich; myself, Assistant State's Attorney Irv Miller; Ed Stabrawa who is taking the statement; and Jerry Mahaffey who is giving the statement.

We are taking the statement in regard to an incident which occurred on August 29, 1983, at 2519 West Jerome, in Chicago, Cook County, Illinois, in the early morning hours, and it concerns the deaths of Jo Ellen Pueschel and her husband Dean Pueschel, and the battery of the child, Richard Sokolowski.

Jerry, you and I talked earlier today about this incident, didn't we?

JERRY MAHAFFEY: A Yes.

Q Before we talked, I gave you your rights, didn't I?

A Yes.

Q I'm going to give you your rights again and I'll ask you if you understand them. And if you do understand them, I'll ask you to go over again with us what occurred on August 29, 1983, okay?

A Yes.

Q Do you understand you have a right to remain silent and that anything you say can be used against you in a court of law?

A Yes.

Q You understand that you have a right to have an attorney present prior to any questioning and to have him present during any questioning. And if you can't afford an attorney, one would be appointed for you by the court. Do you understand that?

A Yes.

Q These are the same rights I gave you earlier today?

A Yes.

Q I also explained to you I was an Assistant State's Attorney working with the police?

A Yes.

Q Jerry, let's go back again to what happened on August 29, 1983, okay?

A Yes.

Q Now, you were with your brother Reginald Mahaffey and discussing going to the north side to commit a burglary, is that correct?

A Yes.

Q Do you know where your brother wanted to commit this burglary at?
A Out north.
Q Out north?
A I don't know where.
Q Did you and your brother drive up to the north side in a van?
A Yes.
Q Did you end up in the area of Howard and Western, where your brother and you were going to break into a clothing store?
A Yes.
Q Is there any reason you didn't break into that store?
A We saw or I spotted a paddy wagon in the alley. You know, you could see the front part of the paddy wagon.
Q Did your brother then drive the van somewhere else?
A Yes. We drove around the block.
Q Where was it parked?
A It was parked in a hospital.
Q A parking lot?
A Yes.
Q Now, were you planning on breaking into one of the stores in the mall on Howard and Western near where you parked the van?
A Yes.
Q You didn't break into that clothing store, is that right?
A No.
Q When you decided not to break into that clothing store, you and your brother came back to the van, is that correct?
A Right.
Q What happened when you guys got back to the van?
A We tried to start the van up and it wouldn't start.
Q What was wrong with it?
A The battery was dead.
Q Did you then leave the van?
A Yes.

Q Where did you guys go?
A Started walking behind the hospital. Then we walked toward the alley and we was searching around the buildings.
Q Did you see anything at that time?
A My brother spotted a window open. We went into the window and started taking things out of the window.
Q Who took the screen off the window?
A My brother.
Q Who went into the apartment first?
A I did.
Q Did your brother go in after you?
A Yes.
Q When you got into the room, what type of room was it that that window was part of?
A It was a bathroom with a shower.
Q Now, when you got in there, what room did you go to first, after the bathroom?
A We went in the grownups' room. We thought it was two girls, or two ladies, rather.
Q What did you do then?
A Then we come out of there and went into the boy's room.
Q What did you do then?
A We came out of there and went in the kitchen.
Q What did your brother do inside the kitchen?
A He had a knife and he opened the refrigerator. I don't know what he got out of there.
Q What were you doing?
A I was wiping off anything we touched.
Q Why?
A Why?
Q Yes.
A For not finding fingerprints.
Q Okay. Now did you guys break into that apartment to get some money? Is that why you went in?
A That was ou[*r*]* intention, yes.

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* Italicized words or phrases in brackets indicate handwritten corrections or insertions on the original typewritten statement made by Jerry Mahaffey.

Q Now, after you had wiped off everything your brother was touching, did you go into another room, after the kitchen?

A Yes.

Q Where did you go?

A We went in the little boy's room.

Q What happened there?

A I put a towel, you know, and tried to strangle him, you know, put him to sleep. And he wouldn't go to sleep.

Q What did you do then?

A Then we put a pillow over his head and he was still, you know, trying to come up for air. You know, trying to make noise.

Q What did you do?

A Then my brother stabbed him.

Q Were you doing anything to him from behind?

A I was still holding the pillow.

Q Did you try to choke him, too?

A Yes.

Q How many times did your brother stab him?

A I don't know. About four or five times.

Q Now, did you see any other type of weapon in that little boy's room?

A Some bats.

Q How many bats did you see?

A It was about eight or nine of them.

Q Did either of you pick up a bat?

A Yes, we both picked up one.

Q What was done with the bats when you picked them up?

A He held the pillow and I hit the boy with the bat.

Q Where did you hit the boy?

A In his head.

Q How many times, do you know?

A About twice.

Q Now, after you did that, did you go into one of the other rooms?

A Yes.

Q Which room?

A Where the lady and the man was.

Q Were they both sleeping?
A Yes.
Q When you went into the room, did each of you still have a baseball bat in your hand?
A Yes.
Q Where, in relation to where the two people were sleeping, did you and your brother stand?
A I was on the side of the man and he was on the side of the woman.
Q What did you do then as the two of them were sleeping?
A My brother hit him and I hit him.
Q Where did you guys hit him?
A In his head.
Q You are talking about the man in the bed now?
A Yes.
Q Do you remember how many times each of you hit him?
A Somewhere around four times apiece, I guess.
Q Did the man stay on the bed as you hit him?
A Did he stay on the bed?
Q Yes.
A After he got the lady off, he rolled off the bed on his stomach.
Q Tell me what happened to the woman?
A Reno took her out.
Q Who took the woman out?
A Reno.
Q That's your brother, Reginald?
A Reginald.
Q Reginald is his real name?
A Yes.
Q The woman was taken out of the room by your brother?
A Yes.
Q What did you do?
A I was still in the room.
Q Now, when you walked out of the room did you see your brother in the living room?
A Yes.

Q What was he doing with the woman?
A He had his dick in her mouth.
Q Do you remember what she was wearing?
A She had on a blue negligee.
Q What about the man, what was he wearing?
A I don't remember. Drawers, I guess.
Q Just drawers?
A Yes. He didn't have no shirt.
Q Did your brother do anything else to the woman besides having his penis in her mouth?
A He had sex with her.
Q He also put his penis into her vagina?
A Yes.
Q After you saw that, did you go back into the bedroom?
A Yes.
Q Did you turn the lights on?
A Yes.
Q What happened as you turned the lights on?
A I saw the man pulling a pistol out.
Q Out of where?
A Huh?
Q Where was he pulling his pistol out of?
A A holster.
Q What did you do at that time?
A I hit him in his head.
Q With what?
A With a bat.
Q Did you go back into the living room then?
A Yes.
Q Did you have any conversation about any more guns with the woman?
A Yes.
Q What did she tell you?
A She said there were more above the dresser, on the wall.
Q Did you go back in there to see if there were any guns in there?
A Yes.

Q What kind of gun was it?
A A pump and thirty-thirty.
Q Did you try and get it off the wall?
A Yes.
Q Were you able to remove it?
A No.
Q What happened to the rifle, or the shotgun, rather?
A It was locked. I couldn't get them off. I pulled and tried to pull them through the holes. There was some holes and I tried to pull them through but I couldn't get them through. So I said, fuck it.
Q Did your brother then get a shotgun off the wall?
A Yes. He snatched it off the wall.
Q When this was going on did the man move at some point during this time?
A Yes.
Q What happened when the man moved?
A My brother stabbed him.
Q Where did your brother stab him?
A All over.
Q Did you do anything with the bat when your brother was stabbing him?
A No, I didn't hit him no more with the bat.
Q Do you remember how many times your brother stabbed him?
A Four or five times.
Q About the chest and side area?
A Yes.
Q Did your brother then start getting some merchandise together to take out of the apartment?
A He had asked the lady, did she have a car. She said, yes. He said, where are the keys. She gave him the keys and she said, let me take you out to the car and turn the alarm off the car.
Q Did your brother take her out then?
A Yes.
Q What was the woman wearing at that time?
A White trench coat.

Q What did you do when your brother took the woman out to turn the alarm off on the car?

A The stuff he had packed in the box, I pulled it toward the door.

Q Do you remember what stuff he put in the box?

A That tape player, the video and that other case.

Q There are some items on the table which you pointed to. There is a box with tapes in it, which has a number three, that I placed on the front of it. Is this the box and the tapes that were in the box?

A Yes, number three.

Q There is a record player here.

A Number four.

Q This Atari game, number four, was this also taken from the apartment?

A Yes.

Q There is a video recorder, Zenith, with a number five on the top of it. It has the words Speed Search on the top. Do you recognize this?

A Yes.

Q Where was this taken from?

A Off the T.V.

Q Was that also placed in the box?

A Yes.

Q Now, there were some guns that were also taken from the apartment. Do you remember what kind of guns they were?

A Yes.

Q What kind of guns were they?

A Three-fifty-seven, pump shotgun, and a thirty-thirty.

Q Now, we don't have the three-fifty-seven here. That's down at the Crime Lab. I'm going to show you these two weapons. One is a pump shotgun marked number two on the handle, and a rifle which is marked 13 on the handle. Do you recognize these guns?

A Yes.

Q Are those the two guns that were taken out of the apartment?

A Yes.

Q Was there also some other items taken from the apartment?

A Yes.

Q I'm going to show you some ammunition. I've got two boxes here. One box is marked seven. It says on the front of the box, Federal shotgun shells. Are these the shells that were placed in the box and taken from the apartment?

A They were put in a bag. But they was in the box.

Q There is another box here marked with the number eight. It says Sears Center Fire cartridges, thirty carbine, twenty in quantity. Do you remember seeing these in the box and taken out of the house?

A It was put in a bag but it was put in the box.

Q Your brother then came back with the woman?

A (Nodding)

Q You have to answer out loud.

A Yes.

Q What did your brother do then after he brought the woman back in?

A When she came back in the little boy ran out the room and said, Mama, Mama. Then we told her to lay down and the little boy laid down, too.

Q What else was said at this time?

A My brother just started beating them with the pistol.

Q Your brother beat who with the pistol?

A The lady.

Q How was he beating her with the pistol?

A How?

Q Yes.

A He had the pistol like that and he was doing this.

Q Let me try to describe what you are doing. His gun was in his hand and his arm was straight out and he was moving up and down toward her?

A Yes.

Q Where was he hitting her with the pistol as he was moving it up and down?

A On the head.

Q Where was the child?

A Right beside her.

Q Was the boy saying anything?
A No.
Q Now, did your brother do anything with that box of merchandise?
A Yes.
Q What did he do?
A He came and got the box and put it in back of the car.
Q Now, did he also take the guns with him?
A No. That was two trips.
Q On the second trip he took the guns?
A Yes.
Q When your brother came back after putting the merchandise in the car, what happened then?
A That's when he hit the woman on the head with the gun.
Q After he hit the woman on the head with the gun, what happened then?
A We left.
Q Where was the young boy?
A Still laying there with his mother.
Q Did you go out to the car then?
A Yes.
Q Is that the car that the woman had taken your brother out to when she turned off the alarm and gave the keys to him?
A Yes.
Q I show you a picture which has a number one on it. Is that the picture of the car that was taken?
A Yes.
Q Do you remember where you went to after you drove away in the man and woman's car?
A To my brother's house.
Q That is your brother, Reginald, right?
A Yes.
Q He lives on 13th Place in Chicago?
A Yes.
Q When you got to his house, did you drop off all the merchandise at his house?
A Yes.

Q Did you have a conversation with him after that about the car?

A Yes.

Q What did you want to do with the car?

A Burn it.

Q What did your brother want to do?

A Take it to Henry Horner.

Q Is that a housing project?

A Yes.

Q What did you do with the car?

A We took it to Henry Horner Project.

Q Did your brother do all the driving that night?

A Yes. I don't know how to drive.

Q Was the car dropped off at Henry Horner and left there?

A Yes.

Q Calling your attention to Tuesday, a few days ago, did you and your brother get together and split up some of the stuff that was taken from the house on Jerome Street?

A Yes.

Q What did you take?

A I took all the tape stuff. It was in a brown army bag.

Q By tape stuff, you are referring to what is marked #3?

A Number 3, #4, and #5.

Q Did you take that to your house at 11216 Indiana?

A No. I had dropped that off at my brother's house, Terry.

Q Did you take it eventually to your house?

A Yes, that was yesterday.

Q When the police had arrested you earlier today, were the items marked 3, 4, and 5, the items on the table there, found at your house?

A Yes.

Q I'm going to show you some other things. Three pieces of jewelry, a watch, a gold watch, Seiko, which is marked 11 on a piece of paper; a gold ring with a blue

stone which is marked #9 on the side; and a chain with a gold cross which is marked with a piece of paper with #10 on it. Do you recognize those three items?

A Yes.

Q Could you tell me where you recognize them from?

A He took them out of the place.

Q Out of the Jerome Street apartment?

A Yes.

Q Did your brother show them to you after he took them out of the Jerome Street apartment?

A Yes.

Q What did you tell him to do with them?

A I told him to throw the shit away. There's a thing missing on there.

Q What is missing?

A A gold medallion is missing. It was attached to the cross.

Q I'm going to show you one photograph, which I showed you earlier, with a #12 on the back. It's a wedding picture. Do you recognize the people in it?

A The man and the lady.

Q Where do you recognize these people from?

A From the apartment.

Q Those are the two people we were talking about at 2519 West Jerome?

A Yes.

Q That is the woman that your brother was having sex with and then took out to the car and she turned the alarm off and the woman he was hitting over the head with the gun?

A Yes.

Q This was the man that was hit over the head with the bat and the one your brother also stabbed, is that right?

A Yes.

Q Do you recognize the boy?

A No, not really. But, I guess that's him.

Q You've been in the police station for a couple of hours now. Have the police treated you okay?

A Yes, he has.

Q Has anybody made any threats or promises to you to get you to make this statement?

A No.

Q George and I have been nice to you also. Do you have any complaints about the way we've treated you?

A No.

Q Let the record reflect, it's 1:30 p.m., this concludes the statement of Jerry MaHaffey. Now, he'll type it up. We'll give it to you and you can make any corrections, okay?

A Yes.

MR. MILLER: Okay. That's it.

/s/ JERRY MAHAFFEY

WITNESSES TO SIGNATURE:

/s/ GEORGE VELCICH ASA 4:35 p.m.

/s/ ASA IRVING MILLER

/s/ LEONARD R. BAJENSKI

ORIGINAL

(3)

Supreme Court, U.S.
FILED
JUL 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2079

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF ILLINOIS,

Petitioner

vs

REGINALD MAHAFFEY,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Reginald Mahaffey, seeks leave to file his brief in opposition to certiorari to the Illinois Supreme Court, without prepayment of fees costs and to proceed in forma pauperis.

Respondent was represented in the Illinois Supreme Court by court-appointed counsel, the Office of the Public Defender of Cook County.

An affidavit is attached in support of this motion.

Respectfully submitted,

RANDOLPH N. STONE,
Public Defender of Cook County
200 W. Adams St.
4th Floor
Chicago, Illinois 60606
(312) 609-2040

By Donald S. Honchell
DONALD S. HONCHELL
Assistant Public Defender

Counsel for Respondent

No. 88-2079

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF ILLINOIS,

Petitioner

vs

REGINALD MAHAFFEY,

Respondent

AFFIDAVIT OF COUNSEL IN SUPPORT OF
RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

DONALD S. HONCHELL, being first duly sworn on oath, deposes and states

1. I am the assistant Cook County Public Defender representing respondent Reginald Mahaffey on appeal from his conviction and death sentence.

2. The Office of the Cook County Public Defender was appointed appellate counsel for respondent following his conviction and sentence of death.

3. Based on the appointment of this Office by the trial judge, I believe respondent is indigent and unable to prepay costs or fees or give security therefor.

4. Respondent seeks to file his brief in opposition to the State's Petition for a Writ of Certiorari without the need to pay filing fees and to proceed in forma pauperis. I offer this affidavit in support of that motion.

5. I have been unable to secure from respondent in time for filing his affidavit of indigency. Upon its receipt, I will forward it to the Clerk of this Court.

By Donald S. Honchell
DONALD S. HONCHELL
Assistant Cook County Public Defender

SUBSCRIBED and SWORN To Before Me this 27th day of July, 1989

"OFFICIAL SEAL"
Evelyn A. Lallas
Notary Public, State of Illinois
My Commission Expires June 30, 1991

Evelyn A. Lallas
Notary Public

No. 88-2079

IN THE

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OCTOBER TERM, 1988

STATE OF ILLINOIS,

Petitioner

vs

REGINALD MAHAFFEY,

Respondent

CERTIFICATE OF SERVICE

TO: Hon. Cecil Partee
State's Attorney
309 Richard J. Daley Cntr
Chicago, Illinois
ATTN: RENE GOLDFARB

Hon. Neil Hartigan
Attorney General
100 W. Randolph St.
12th Floor
Chicago, Illinois

PLEASE TAKE NOTICE that Reginald Mahaffey has, on July 10, 1989, forwarded to the Clerk of the United States Supreme Court his Brief in Opposition to Certiorari, together with his Motion for Leave to Proceed in Forma Pauperis supported by affidavit.

ENCLOSED please find three copies of said Brief in Opposition and one copy of said Motion for Leave to Proceed in Forma Pauperis supported by affidavit.

RANDOLPH N. STONE
Public Defender of Cook County
200 W. Adams St.
4th Floor
Chicago, Illinois 60606
(312) 609-2040

By Donald S. Honchell
DONALD S. HONCHELL
Assistant Public Defender

Counsel for Respondent

No. 88-2079

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF ILLINOIS,

Petitioner

vs

REGINALD MAHAFFEY,

Respondent

On Petition for A Writ of Certiorari
To The Supreme Court of Illinois

BRIEF IN OPPOSITION TO CERTIORARI

RANDOLPH N. STONE
Public Defender of Cook County
200 W. Adams St.
4th Floor
Chicago, Illinois 60606
(312) 609-2040

Counsel for Respondent

DONALD S. HONCHELL*
Assistant Public Defender

*Counsel of Record

QUESTION PRESENTED FOR REVIEW

Whether the Illinois Supreme Court's finding of prejudice in the failure to sever respondent's trial from the trial of his codefendant, who did not testify but whose confession implicating respondent was introduced in their joint jury trial, requires review by this Court.

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Respondent

BRIEF IN OPPOSITION TO CERTIORARI

JURISDICTION

The jurisdictional requisites are adequately stated in the petition. Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. sec. 1257(3).

STATEMENT OF THE CASE

Respondent and his codefendant brother were jointly charged by indictment filed in the circuit court of Cook County, Illinois. Prior to their trial, respondent sought a severance (R. 1045) on grounds he would be prejudiced in violation of the Bruton rule by presentation of the codefendant's statement implicating respondent if the codefendant did not testify. (R. 1045-6) The State resisted the severance motion on the basis of Parker v. Randolph because, in this case, both respondent and the codefendant had made interlocking statements. (R. 1047-55) In reply, defense counsel stressed respondent was contending the statements he

made were the product of police coercion, a different situation from that portrayed by the prosecutor. (R. 1055-6) In his ruling, the judge relied on Parker v. Randolph to deny the severance, finding under that case the statements of respondent and his codefendant to be interlocking and, so, no justification for a severance arose. (R. 1057-61) Counsel's subsequent request for separate juries for respondent and his codefendant was likewise denied. (R. 1062-5) Thereafter, during the joint jury trial, the prosecution presented both respondent's statement (R. 2896-2924) and that of the codefendant. (R. 2941-63) Details of the codefendant's statements implicated respondent as involved in the crime. The codefendant did not testify in his own behalf and, therefore, respondent could not cross-examine him on the allegations in his statements of respondent's participation in the offense.

Respondent testified at the joint trial, relating his statements resulted from being beaten by police officers (R. 3684-5, 3686-7, 3690-1, 3692) and explaining he had purchased the items found in his home belonging to the victims. (R. 3676, 3677, 3678-9, 3680, 3682-3, 3692-5) He further testified the contents of the confession had been supplied to him by authorities (R. 3684, 3692) after he had been informed on what had happened (R. 3672, 3686) and after he had been told what his statement was to be. (R. 3684, 3692)

Respondent was thereafter convicted of all but one charge against him (R. 3955-6) and faced a death penalty hearing. Following that hearing, respondent was sentenced to death (R. 4274) and appealed to the Illinois Supreme Court.

In ordering respondent be retried, the Illinois Supreme Court considered only the judge's constitutional error in denying respondent a severance as requested. (Op. at pp. 14-16; Appendix, pp. A16-19) It rejected the State's claim the codefendant's confession was independently admissible against respondent due to its interlocking nature with the statements of respondent. And it refused to find the constitutional error to be harmless and without influence on the jury's assessment of respondent's responsibility for the crimes. In doing so, it emphasized respondent had claimed his statements were coerced but his defense "of coercion was undercut by his inability to confront (codefendant) regarding the accusations contained in his statement". (Op., p. 16; Appendix, p. A19) On "this set of facts", respondent was held to be prejudiced by the constitutional error resulting from denial of severance and deserving of retrial. (Op. at p. 16; Appendix at p. A19) From this holding, petitioner now seeks leave to appeal to this Court.

REASONS FOR DENYING THE WRIT

THE ILLINOIS SUPREME COURT'S FINDING OF PREJUDICE IN THE FAILURE TO SEVER RESPONDENT'S TRIAL FROM THE TRIAL OF HIS CODEFENDANT, WHO DID NOT TESTIFY BUT WHOSE CONFESSION IMPLICATING RESPONDENT WAS INTRODUCED IN THEIR JOINT JURY TRIAL, IS A PERMISSIBLE RESULT WHICH DOES NOT REQUIRE REVIEW BY THIS COURT

Petitioner urges this Court to review the finding of the Illinois Supreme Court that, under the decision in Cruz v. New York, 481 U.S. 186 (1987), respondent deserves retrial since jointly tried with a codefendant whose confession implicated him in the crime but who did not testify so as to be exposed to cross-examination under respondent's constitutional right to confront witnesses against him. Petitioner does not deny that error in refusing a severance occurred and that respondent was deprived of that crucial constitutional right. Nor does it dispute that the error in the resulting trial matched the error recognized by this Court in Cruz. Nor does it argue that the Illinois Supreme Court failed to address the issue of harmless error which petitioner offered below as a rationalization to avoid the necessary retrial. It simply quarrels with the outcome of the Illinois Supreme Court's harmless error analysis. In doing so, it fails to offer compelling legal grounds for review of the order of retrial in this case.

Rather than focusing on the correct aspect of the harmless error principle, as revealed by the decisions of this Court and lower federal courts of review, petitioner addresses the evidence it believes proved respondent guilty of the charges. In fact, however, the proper test for harmless error is not "whether there was sufficient evidence on

which the (respondent) could have been convicted without the evidence complained of" but "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (Fahy v. Connecticut, 375 U.S. 85, 86-7 (1963); DeVine v. Solem, 815 F.2d 1205, 1207-8 (8th Cir. 1987)) Even in this Court's decision in Schneble v. Florida, 405 U.S. 427 (1972) relied on by petitioner, this Court phrased the harmless error test as whether "there is a reasonable possibility that the improperly admitted evidence contributed to the conviction." (405 U.S. at 432) Thus, the existence of the "reasonable possibility that error of constitutional dimension influenced the jury in reaching a verdict" requires retrial. (United States v. Argentine, 814 F.2d 783, 789 (1st Cir. 1987); see also Thompson v. Leeke, 756 F.2d 314, 316 (4th Cir. 1985); United States v. Porter, 764 F.2d 1, 7 (1st Cir. 1985); United States v. Christian, 571 F.2d 64, 69-70 (1st Cir. 1978))

This Court has been hesitant to heavily rely on purported "overwhelming evidence" to excuse trial errors found to deprive citizens of constitutional rights. In Harrington v. California, 395 U.S. 250, 254 (1969) (relied on by petitioner), this Court recognized it had admonished in Chapman v. California, 386 U.S. 18, 23 (1967) (also relied on by petitioner here) "against giving too much emphasis to 'overwhelming evidence' of guilt, stating that constitutional errors affecting the substantial rights of the aggrieved party could not be considered to be harmless."

In fact, having found constitutional error, State reviewing courts are expected, except in rare circumstances narrowly defined, to order trial anew. As this Court noted in United States v. Agurs, 427 U.S. 97, 112 (1976):

> "when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his 'conviction is sure that the error did not influence the jury or had but very slight effect.' (citation omitted)"

In this cause, the Illinois Supreme Court evaluated respondent's "set of facts" and found, as was its prerogative, the reasonable possibility the constitutional error affected respondent's rights. There has been no showing of a legal issue on which this Court should now intervene.

As the Illinois Supreme Court recognized, respondent in this case based his trial defense on, among other points, the claim his statements were coerced. When the codefendant's statements which implicated respondent were presented at trial and the codefendant did not testify to be examined on the voluntariness of those statements, the jury received unchallenged evidence of respondent's guilt to use to convict respondent. Thus, there is indeed, as the Illinois Supreme Court was authorized to find, the reasonable possibility the codefendant's confession contributed to respondent's conviction. For, even if the jury disbelieved respondent's statements as coerced and involuntary, it could base a conviction on the codefendant's declaration of respondent's participation, accusations respondent was powerless to weaken since the codefendant, source of the revelations, did not testify. It was only appropriate these circumstances yielded the conclusion error under Cruz v. New York was not harmless.

The harmless error standard was correctly applied to a situation such as this in United States ex rel Sanders v. Lane, 835 F.2d 1204 (7th Cir. 1987). There, the Court of Appeals stressed, citing Harrington v. California, that "whether Sanders could have been convicted on the basis of his own statement is not the target of our inquiry." Rather, the "harmless error analysis must focus on the potential contribution of the tainted evidence - Hunter's statement - to Sanders's conviction." (835 F.2d at 1207) Therefore, this Court should appreciate the Illinois Supreme Court here too ruled within its discretion, as the Seventh Circuit Court of Appeals did in Sanders. to determine the undisputed constitutional infraction contributed to respondent's criminal conviction.

Petitioner endeavors to recite how convincing was the evidence of respondent's guilt. (Pet., pp. 13-23) In fact, it merely reiterates the facts and circumstances known to the Illinois Supreme Court but there found unavailing. There need be no re-examination of these facts by this Court.

The mere similarity of respondent's statements to other prosecution evidence does not create harmless constitution error here as petitioner suggests. Respondent's statement was made several days after the commission of the crimes, at a time when the facts were known to authorities. As part of respondent's trial defense, respondent testified that officials told him what had happened in the case (R. 3672, 3686), told him what his statement was to be (R. 3684, 3692), and then supplied the information to him to repeat in the confession. (R. 3684, 3692) The credibility of this claim, of

course, rests with the trier of fact but the Illinois Supreme Court correctly recognized the simple resemblance of respondent's disclosures to State evidence does not automatically mean the use of the codefendant's untested accusations could not be found to be prejudicial here.

Moreover, the material in respondent's statement does not uniformly match every fact in the case. For example, the physical evidence indicated a detached telephone handset in the kitchen (R. 2258-9) which was not described by respondent. It included stab wounds to the female victim (R. 2322-3) which respondent never mentioned (relating solely a beating with a pistol (R. 2916, 2917)). The evidence included an empty gun holster near the male victim (R. 2266) which respondent did not establish. It further included shampoo bottles (R. 2277) the respondent never related had been moved during the entry. It included as well a baseball bat found in the kitchen (R. 2258) which the respondent never explained had been left there. It included also a bolster which bore blood stains and matched the color of the living room couch (R. 2274) but whose movement was never accounted for by respondent. And it included bloodstains in a bathroom sink (R. 2275) likewise never referred to by the respondent. These examples merely highlight the function of the Illinois Supreme Court to review the record and make its own determination, worthy of respect in this Court, on the presence (or, indeed, absence) of prejudicial error.

The remaining prosecution evidence does not significantly contribute to the conviction as petitioner believes so as to compel this Court to review the Illinois Supreme

Court's holding of harmful error. While a victim identified respondent at trial, he did not observe the intruders when first attacked (R. 2443), he viewed his assailant thereafter for some 10 seconds (R. 2442, 2444-5, 2451-2) while scared (R. 2442), upset and nervous (R. 2443), and he failed to indicate any identification of respondent as the offender when he viewed him in a lineup only days after the crime. (R. 2440-1, 3012, 3639) Moreover, the physician who treated this victim for his injuries testified the judgment and vision of the person so wounded would be impaired. (R. 2868, 2869, 2870)

Investigating officers failed to find physical evidence on the scene, such as fingerprints or bloodstains, which connected respondent to the crimes. (R. 2301, 2304, 2305, 2313, 2361, 2364-5, 3256-69, 3295, 3327-8, 3337) Nor did police find respondent's fingerprints in the victims' recovered auto. (R. 2502) And no evidence appeared respondent was seen at or in that vehicle. (R. 2501, 2502, 2503) Finally, respondent provided an explanation for his possession of the victims' property by identifying them as items he had purchased. (R. 3676, 3677, 3678-9, 3680, 3682-3, 3692-5) The Illinois Supreme Court thus correctly reasoned as it was entitled to do that respondent's conviction was influenced by the introduction of codefendant's confession. To properly conclude respondent's guilt must be fairly resolved by the trier of fact without this evidence since it could not assume the critical constitutional error under Cruz v. New York could be dismissed as harmless. No basis has been shown for disturbing that result.

Petitioner concludes respondent's confession contained the criminal elements charged (Pet., p. 21) and nothing in fact was added to the case by the codefendant's statements

(Pet., p. 22) so that the assumed per se rule of the Illinois Supreme Court used to order retrial here was incorrect. (Pet., p. 23) None of these claims warrants action by this Court to overturn the election of that court to find the unchallenged constitutional error to be prejudicial. Because the codefendant's confession assisted the State in overcoming respondent's trial defense that his statements had been coerced, much was indeed added to the prosecution's case against respondent by its use at the joint trial here. And there was no per se rule ever utilized here by the Illinois Supreme Court. Rather, that court considered the set of circumstances here and chose to find the State had not proven that the clear and undisputed constitutional error was in fact harmless. It is not necessary for this Court to now review that decision. Consequently, the petition seeking action by this Court should be denied.

CONCLUSION

For the reasons stated herein, respondent Reginald Mahaffey respectfully requests that this Honorable Court deny the Peition for a Writ of Certiorari.

Respectfully submitted,

RANDOLPH N. STONE
Public Defender of Cook County
200 W. Adams St.
4th Floor
Chicago, Illinois 60606
(312) 609-2040

Counsel for Respondent

DONALD S. HONCHELL*
Assistant Public Defender

*Counsel of Record

office of the
COOK COUNTY PUBLIC DEFENDER
[illegible] • 47TH FLOOR • CHICAGO, ILLINOIS 60606 • (312) 609-2042
Randolph N. Stone • Public Defender

July 10, 1989

Hon. Joseph Spaniol, Jr.
Clerk of the Supreme Court
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Dear Sir,

Enclosed please find the original and 3 copies of the Brief in Opposition to Certiorari to be filed in the cause of State of Illinois v. Reginald Mahaffey, No. 88-2079 now pending for disposition. I have also enclosed the certificate of service showing delivery of copies of the Brief in Opposition to opposing counsel for the State of Illinois (Attorney General and State's Attorney) and a motion for leave to proceed in forma pauperis supported by affidavit of counsel. As indicated in the affidavit, I have been unable to secure an affidavit from the respondent in time to include with the motion. However, I will endeavor to secure that affidavit as soon as possible and forward it to the Clerk's Office. I trust I will be able to file the Brief in Opposition without difficulty and I thank you for your attention to this matter. I also enclose an appearance form.

Sincerely,

Donald S. Honchell

DONALD S. HONCHELL
Assistant Public Defender

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 88-2079

State of Illinois (Petitioner or Appellant) vs. Reginald Mahaffey (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for Reginald Mahaffey

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States.

Signature Donald Sargent Honchell

(Type or print) Name DONALD SARGENT HONCHELL

☒ Mr. ☐ Ms. ☐ Mrs ☐ Miss

Firm Office of the Cook County Public Defender

Address 200 W. Adams St. 4th Floor

City & State Chicago, Illinois Zip 60606

Phone (312) 609-2040

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A